SUPREME COURT, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 818

UNITED STATES LINES COMPANY and
SS. *AMERICAN HARVESTER*,

Petitioners,

against

EMANUEL VAN CARPALS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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SS. *American Harvester*,

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against

EMANUEL VAN CARPALS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on December 13, 1961, which reversed the dismissal, after trial, of a libel in admiralty and awarded damages to the libelant, the respondent herein. The Court of Appeals denied their petition for re-hearing on January 10, 1962, and their prayer for a re-hearing *in banc* on January 18, 1962.

This petition seeks a review of a holding that, in effect, requires a shipowner to furnish an accident-free ship to an employee of a shipyard engaged in testing for safety the very appliance which caused his injury, as part of a Coast Guard inspection which the law requires, and disregards the determination by the finder of the facts that the vessel and its appurtenances were reasonably fit for their intended use by the libelant, and, therefore, not unseaworthy.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit (R. 19a), pages A-1 to A-5 of the Appendix hereto, is reported at 297 F. 2d 9.

The words "and it erupted" at 297 F. 2d 11 were not contained in the original opinion of the Court of Appeals. Contrary to the statement in the opinion, of three asserted "conceded physical facts" serving as the single premise for the court's conclusion, neither these words, nor the horrendous advocate-inspired language for which they were substituted, are "conceded physical facts."

The Appellate Court's opinion (R. 36a) denying the petition (pages A-1 to A-5 of the Appendix hereto, is not yet reported, nor is the memorandum decision (R. 41a), page A-20 of the Appendix hereto, denying the re-hearing *in banc*.

The opinion of the United States District Court for the Southern District of New York (R. 2a), printed at pages A-5 to A-8 of the Appendix hereto, stated as constituting its findings of fact and conclusions of law, has not yet been reported.

Jurisdiction.

As heretofore stated, the judgment of the United States Court of Appeals for the Second Circuit was entered on December 13, 1961 (R. 25a), and the petition for a re-hearing and for a re-hearing *in banc* (R. 27a) filed by the petitioners on December 28, 1961, pages A-9 to A-17 of the Appendix hereto, were denied by orders entered on January 10, 1962, and January 18, 1962, respectively (R. 39a, 43a).

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 United States Code.

Questions Presented.

In McAllister v. United States, 348 U. S. 19, 20, this court said that "In reviewing a judgment of a trial court sitting without a jury in admiralty, the Court of Appeals may not set aside a judgment below unless it is clearly erroneous," and that "no greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure." Because the Court of Appeals deliberately and specifically refused to apply the McAllister standard in reviewing the judgment of the district court, particularly to the express finding of the trial court that the vessel and her appurtenances were reasonably fit for their intended use by the libelant and, therefore, seaworthy, the following are the first two questions presented:

1. Is a finding by the trial judge sitting in admiralty, that a vessel and its appurtenances were reasonably fit for their intended use by the libelant and that they were, therefore, seaworthy, a finding which may not be aside unless clearly erroneous?

2. May the Court of Appeals set aside the judgment of the court below and the findings of the district judge, who saw and heard the witnesses, without applying the clearly erroneous standard, on the ground that unseaworthiness is a question of law which is not subject to that standard?

In Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 550, this court said that a shipowner is not obligated to furnish an accident-free ship, and that while the duty is absolute, it is "a duty only to furnish a vessel and appurtenances reasonably fit for their intended use." Since the judgment

of the district court held that the shipowner discharged that absolute duty, a further question is presented:

3. May the Court of Appeals without appraising for reasonableness the circumstances of the particular use of an appurtenance of a vessel by an employee of a shipyard engaged in testing such appurtenance for the presence of steam and hot water and safety, as part of the Coast Guard inspection required by law, and, without proof of any defect whatsoever, hold that the libelant is conclusively entitled to recover damages for unseaworthiness as a matter of law for "unfitness" (not the *omission of reasonable* fitness and contrary to the finding of the district judge that the vessel and its appurtenances were *reasonably fit* for their intended use), solely by reason of the mere happening of an accident and the presence of steam in such appurtenance, together with an incorrect assertion of a conceded fact that "it erupted," although it emanated from the appurtenance without any finding of unreasonable pressure.

In Seas Shipping Co. v. Sieraki, 328 U. S. 85, 95, 96, this court held a shipowner could not avoid its obligation to warrant the seaworthiness of a vessel and its appurtenances to a person performing seaman's work by parcelling out such work to obtain the advantages of modern divisions of labor. Consequently, the following questions are presented by reason of the status of libelant, the particular work he was performing and the status of the vessel:

4. Is there a warranty of the seaworthiness of a cargo vessel and its appurtenances, under the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, to a shore based shipyard worker engaged in testing such appurtenances for a Coast Guard inspection and certification required by law (46 U. S. Code, Sections 391, 392, 399 and 46 Code

of Federal Regulations, Part 91) to permit cargo vessels to engage in navigation?

5. (a) Does the absence of a warranty of seaworthiness to such a shore based worker require the vessel to be completely out of navigation and a "dead" ship whereby there is no warranty of seaworthiness to any person working on the vessel? (b) Is it sufficient for such absence to hold that the work performed by such a shore based worker is not a seaman's work parcelled out to obtain the advantages of modern divisions of labor but is, instead, work required to meet the standards of the Coast Guard inspection and certification for the vessel's right to navigate?

Statutes Involved.

The pertinent portions of 46 U. S. Code for the inspection and certification of the cargo steam vessel in suit are: 46 U. S. Code, Section 391, subdivision (b), requiring inspection of steam vessels to be made at least once in every two years to determine, among other things, that "she may be used in navigation, with safety to life," 46 U. S. Code, Section 392, requiring inspection at least once in every two years of the boilers of non-passenger vessels to show that they may be safely employed and requiring that such boilers and main steam pipes be subject to hydrostatic or other tests to determine their working pressure, and 46 U. S. Code, Section 399 (certificate of inspection). These are printed at pages A-21 to A-28 of the Appendix hereto.

The pertinent regulatory provisions of the Coast Guard are contained in Sub-chapter I (Cargo and Miscellaneous Vessels) commencing at Part 90, of 46 Code of Federal Regulations, particularly Part 91 (Inspection and Certification).

Section 91.15 provides that the standards of inspection of hulls, boilers and machinery are those established by the American Bureau of Shipping and that the certificate of such American Bureau of Shipping shall be accepted as standard by the inspectors, and Section 91.25-10 provides that the inspection for certification shall insure the fitness of boilers and their equipment for the purpose for which such appurtenances are intended. Section 91.27-1 et seq. provides that reinspection shall be made every two years for such tests as "necessary to be assured of the seaworthiness of the vessel." They are printed at pages A-29 to A-30 of the Appendix hereto.

The extent of the applicability of Supreme Court Admiralty Rule 46½ and Rule 52(a) of the Federal Rules of Civil Procedure (findings and their review) to admiralty cases has been elucidated in *McAllister* v. *United States*, *supra.*

Rule 46½ requires that in cases of Admiralty and Maritime jurisdiction, the district court shall make findings of fact and conclusions of law and Rule 52(a) provides that "in all actions tried upon the facts without a jury" the court shall make findings of fact and conclusions of law, which may appear in its opinion, and that such findings "shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Statement.

The opinions of the Court of Appeals embody a previously stated view by the opinion writer of "strict liability," bordering on advocacy, which makes a nullity of this court's determination that the *only* requirement for seaworthiness is "reasonable fitness" for "intended use,"

a view that regards the actual application of the "reasonable fitness" measure of liability as a species of the impermissible application of the "reasonable care" negligence concept in appraising seaworthiness.

This is a suit in admiralty filed *in rem* against the steamship *American Harvester*, a cargo vessel, and *in personam* against United States Lines Company, its owner (incorrectly referred to in the appellant's Appendix as United States Lines Co., Inc.). The libel was filed on November 16th, 1959.

As stated in the opinion of the district court (R. 2a) (pages A-5 to A-8 of the Appendix hereto), the libelant is an employee of Todd Shipyards Corporation who filed his libel for injuries sustained on July 30, 1958 on the steamship *American Harvester*, while removing a valve from a port boiler, alleging (as found by the district court) that in the course of exercising his duties he was burned as a result of steam and hot water gushing from the valve. The work being performed by libelant was part of the bi-annual Coast Guard inspection required by law. 46 U. S. Code, Sections 391, 392, 399, and 46 C. F. R. Part 91.

United States Lines Company defending the suit both as claimant (owner) of the steamship *American Harvester* and as the respondent *in personam*, filed a petition pursuant to Admiralty Rule 56 impleading Todd Shipyards Corporation on the ground that if the libelant were injured, as alleged, the gushing of the steam and hot water was the result of unworkmanlike services of employees of Todd Shipyards Corporation and that, therefore the claimant-respondent was entitled to be indemnified.

The suit came on for trial on March 24, 1961 before Honorable Charles M. Metzner, United States District Court Judge, sitting in admiralty without a jury.

Libelant testified that he was employed by Todd Shipyards Corporation doing outside machinist work and that

an accident occurred on July 31, 1958, when the vessel was in the Brooklyn Army Base, while he was working with a supervisor (referred to as a "snapper" in the trade), and in his answer to one of the questions he described his work as follows (R. 7a):

> "A. We supposed to take the boiler valves off for a check by the Coast Guard. So we usually start loosening them and then testing if steam comes out or anything like that, water come out."

It is clear from the above that libelant was aware that as part of his testing operation steam or hot water could come out of the boiler valve, and this, at the outset, negated any warranty that steam or hot water could not possibly come out.

He also testified, in effect, that he did not rely on any warranty that there was no steam in the valve for he, himself, as part of his work, checked the valve for the presence of any water or steam, and that his own supervisor checked the valve for the presence of such water before they started work.

Libelant's supervisor testified that the job was to overhaul the boiler valves for the United States Coast Guard inspection and to open them up and that he checked the gauge to make sure that the gauge was not faulty, and that his various tests showed no pressure.

The marine engineer of the respondent testified that the United States Coast Guard inspection was an American Bureau of Shipping examination that, as part of the inspection procedure, the American Bureau of Shipping would have to certify the condition of the ship's equipment, that the boiler was subject to the hydrostatic tests for gauging the safety valves on the boiler, that such tests had been passed satisfactorily, and that all of the tests showed that there was no pressure in the boiler.

At the conclusion of the trial the district judge filed an opinion constituting his findings of fact and conclusions of law and dismissed the libel. His findings indicate that the libelant proved no defect whatsoever in any of the ship's appliances and that, although in the district court's view of the law, the libelant could invoke the doctrine of unseaworthiness, he was unable to show that the vessel was unseaworthy. The trial court found, in accordance with the definition of seaworthiness contained in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, that the vessel was not unseaworthy as the libelant was "furnished a vessel and appurtenances reasonably fit for use by libelant."

The impleading petition was dismissed, but this was academic in view of the dismissal of the libel.

Libelant appealed from the dismissal of the libel to the United States Court of Appeals, Second Circuit, and a protective appeal was filed by the shipowner from the dismissal of the impleading petition so that an opportunity would be afforded to prove that any presence of steam and hot water in the pipes was due to the unworkmanlike services of the libelant's employer, in the event of a remand for further proceedings.

The United States Court of Appeals filed its opinion on December 13, 1961, written by Judge Charles E. Clark, reversing the district court's implicit finding of failure to show unseaworthiness as well as its affirmative finding of seaworthiness, and awarded the libelant his damages. The court affirmed the dismissal of the impleading petition, declining to remand the cause for further proceedings.

Of course, the Appellate Court could only affirm or remand the previously academic dismissal of the impleading petition in view of the barren proof of libelant and this petition is directed only to the reversal of the dismissal of libelant's claim.

The Court of Appeals, ignoring the finding that the libelant had failed to prove any unseaworthiness in fact, held that the vessel was unseaworthy as a matter of law.

The holding of unseaworthiness as a matter of law was based on three asserted conceded physical facts: (1) the accident occurred, (2) there was steam in the valve, and (3) it (the valve) exploded, a non-existing physical fact.

When it was brought to the attention of the Court in the petition for rehearing that the horrendous word "exploded" had a bearing on reasonable fitness and was merely a parroting of language used by libelant's counsel in his brief, the Court relented, but instead of striking that entirely, substituted the word "erupted" in its place, which was also not a conceded fact. How knowledgeable counsel would ever concede such a chameleon-like "fact" is beyond understanding, since an "eruption" can be minute (as the eruption of a pimple), or tremendous (as the eruption of a volcano). The fact found by the district judge (and accepted by the Court of Appeals) was that steam and hot water "gushed forth," obviously without any unreasonable or great pressure, or the trial judge who saw and heard the witnesses would have so found.

Apart from the interpolated three so-called "conceded physical facts," the findings and testimony recognized by the Court of Appeals and set forth in its opinion of December 13, 1961, are:

> "'The boilers of claimant's steamship were being subjected to a periodic examination by the Coast Guard. The libelant was removing a bonnet from a valve preparatory to its being examined. There were 8 bolts connecting the bonnet to the valve. After he loosened up four of the nuts, some water escaped, and libelant notified his snapper. The snapper said he would have the water shut off.

In the meantime, the libelant and the snapper went to lunch. When they returned the snapper told the libelant that the lines were clear, and the libelant unscrewed all 8 nuts and pried the bonnet loose from the valve with the aid of a screwdriver. Nothing came out at the time.

'Libelant went up on top of the boiler to be in a better position to pull the bonnet off. When the bonnet came off, steam and then hot water gushed forth from the valve, burning the libelant.'

"There was also testimony from the "snapper" or foreman, as well as from the first engineer, that with the gauges disconnected after the initial pressure had been noted, a check then showed no pressure on the line; and they both appear at a loss to understand how the water later could escape from the valve. So the trial judge said, 'This appears to be the type of unexplained accident for which liability cannot be predicated on negligence'; and he held that, since the checks showed an absence of pressure, the vessel was not unseaworthy. Accordingly he dismissed the libel."

Judge Clark, loath to accept the definition by this court of unseaworthiness, in *Mitchell* v. *Trawler Racer, Inc.*, *supra*, as "reasonable fitness" for "intended use," virtually "swept it under the bed" by failing to analyze the particular intended use and finding "unfitness" without modification, yet it is obvious that an appurtenance may be reasonably fit for one use and not reasonably fit for another use.

His view of an absolute duty seems to be "absolute liability," for the opinion stresses such phrases as "liability without fault," the independence of "unseaworthiness" from "reasonable care" and, *solely* on the basis of three *asserted* "conceded physical facts" holds that "Under the circumstances here disclosed of substantial injury from a

failure of the ship's machinery, which demonstrated that it was *unfit* for its intended use, the breach of duty is clear" (italics added), thus dropping the concept of "reasonable fitness" for the *particular* use altogether, by its categorical "unfit" characterization in absolute terms.

The petition for re-hearing, and for a re-hearing *in banc*, was denied in an opinion disposing of its four basic considerations as follows:

1. The request that the horrendous words "and it exploded" be deleted from the opinion as contrary to fact, not a "conceded physical fact," and a mere echo of the brief of libelant's counsel was granted to the extent of substituting the broad and imprecise "erupted," a word plucked out of the air, since it was neither a conceded physical fact nor contained in the trial judge's findings.

2. The contention that the finding that the vessel and its appurtenances were reasonably fit for use by the libelant, as well as the implicit finding that the libelant failed to prove any defect in the ship's appliance could not be disregarded without application of the "clearly erroneous" standard was rejected out of hand with a cavalier statement that the "appellee seems not to realize" that "unseaworthiness is a conclusion of law," supported only by the opinion writer's early precedent in *Krey* v. *United States*, 123 F. 2d 1008, made before this Court's clear cut definition of unseaworthiness in *Mitchell* v. *Trawler Racer, Inc., supra.*

3. The Court of Appeals apparently rejected the contention that liability for unseaworthiness to a person who may assert such a warranty is a relative concept which must take into consideration the particular use of an appurtenance and its relative use by and the status of the

person using it, by confusing this relative concept with the existence of the warranty itself, for it failed to consider the factual disparity involved in different intended uses and concluded that a warranty exists without discussion of that concept. That failure is emphasized by its comparison with a cited case of proved defects resulting in injuries to a *member of a crew*, where the appliance was obviously not reasonably fit for use by a crew member.

4. The last contention that there is no warranty of seaworthiness under the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, to a person employed in accordance with the requirements imposed by law to test a vessel in order to assure its seaworthiness, and that this is not a "parceling out" of a seaman's work to obtain the "advantages of more modern divisions of labor" is rejected by suggesting that a ship must be completely withdrawn from navigation to negate a warranty, a curious "all or nothing" view which would require all on board to be excluded from the warranty if anyone on board is to be exempted.

Contrary to the apologetics in the opinion denying rehearing, the bi-annual inspections required by law are far from "routine," as indicated by the statutes and detailed inspection regulations, and the removal of the valve bonnet as part of the major dismantling operation involved in testing the boilers and valves of the vessel pursuant to their requirements can hardly be regarded as "an ordinary maintenance operation."

The denial with respect to the impleading petition is not involved on this application.

The petition for rehearing *in banc* was denied on January 18, 1962, and the opinion writer did not, as requested, suggest *in banc* action, although he has urged such action with vehemence when his views were not accepted.

Reasons for Granting the Writ.

I.

Insofar as it holds that the trial court's finding of seaworthiness is immune from the standard required by McAllister v. United States that the lower court's judgment may not be set aside unless clearly erroneous, the decision is in conflict with the Court of Appeals for the Ninth Circuit and is also in conflict with a current decision by another panel of the court.

McAllister v. *United States*, 348 U. S. 19, teaches us that "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous" and that its holding of negligence (which the Court of Appeals has equated on scope of review with the holding of seaworthiness) may not be disturbed when "there was substantial evidence from which the District Court could and did find that respondent was negligent."

Yet the Court of Appeals sloughed off the *McAllister* requirement and held in its opinion denying rehearing that seaworthiness was not subject to the "clearly erroneous" standard. This is particularly egregious in view of the trial judge's finding in accordance with the standard of seaworthiness prescribed in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, that the vessel and its appurtenances were reasonably fit for the intended use by the libelant, the ready acceptance from a brief of an unfound and nonexisting fact affecting reasonableness (later withdrawn), and the characterization of the bi-annual Coast Guard test and inspection as "a routine inspection" and the work involved in that statutory inspection as "an ordinary

maintenance operation," although the trial judge who saw and heard the witnesses made no such "ordinary" and "routine" findings.

The United States Court of Appeals for the Ninth Circuit in *Lind* v. *American Trading and Production Corp.*, 294 F. 2d 342, 345, 346, and footnote 7, held that the reviewing court had no more authority to set aside a determination that a vessel was seaworthy than it had to set aside a determination of negligence without the application of the "clearly erroneous" standard required by the *McAllister* case, citing its previous holding as to negligence in *Pacific Tow Boat Co.* v. *States Marine Corp. of Delaware*, 276 F. 2d 745.

In the latter case it was noted at page 752 that the Second Circuit view was contrary to the Ninth Circuit rulings and "has long prevailed in the Second Circuit."

Recently the Ninth Circuit in *Morrell* v. *United States*, 297 F. 2d 662, again held that seaworthiness is a question of fact.

The opinion writer in the case at bar insisted that his holding that *McAllister* does not apply to rulings of seaworthiness, was the prevailing view of the Second Circuit, in his discursive dissent in the case of *Frank Puddu* v. *Royal Netherlands Steamship Company*, from a denial of a petition for a rehearing *in banc*. The original *Puddu* opinion of the Court of Appeals for the Second Circuit (decided January 3, 1962, Number 119—September Term, 1961, Docket No. 27095) has not yet been reported, nor has Judge Clark's aforesaid dissent (decided February 20, 1962) been reported. On page 1209 of the slip opinion, in contending that his colleagues deviated from the Second Circuit view, he asserted:

> "• • • Moreover, the district judge treated the question of unseaworthiness as one of fact, thus

> going directly against our rulings that unseaworthiness (like negligence) is a question of law. *Van Carpals* v. *S.S. American Harvester, supra,* Jan. 10, 1962 (rehearing denied); *Krey* v. *United States,* 2 Cir., 123 F. 2d 1008. Cf. *Romero* v. *Garcia & Diaz, Inc.,* 2 Cir., 286 F. 2d 347, 355, certiorari denied 365 U. S. 869. And the panel seems to agree with the trial judge, for its opinion, too, treats the appeal as raising only questions of fact, not to be reviewed under the rule in *McAllister* v. *United States,* 348 U. S. 19."

In *Romero* v. *Garcia & Diaz, Inc.,* 286 F. 2d 347, 355, 356, cert. den. 365 U. S. 869, which Judge Clark cites above, doubt is voiced regarding the soundness of the Second Circuit view that negligence is not subject to the clearly erroneous test, and that this view may no longer be permitted "as our colleagues in the Ninth and Sixth Circuits tell us, *Pacific Tow Boat Company* v. *States Marine Corp.,* 9 Cir., 1960, 276 F. 2d 745, 752; *Imperial Oil, Ltd.* v. *Drlik,* 6 Cir. 1956, 234 F. 2d 4, 10, certiorari denied, 1956, 352 U. S. 941, 77 S. Ct. 261, 1 L.Ed. 2d 236."

The *Puddu* case reflects the intra-circuit conflict in the Second Circuit on the extent of review of unseaworthiness findings.

While the Second Circuit has taken the view that seaworthiness is not for the trier of the facts when the trier is a judge, it took the contrary position (over the objection of Judge Clark) that it is for the jury as the "trier of the facts" to determine whether a vessel is "reasonably suited for her intended use" in *Pinto* v. *States Marine Corporation,* 2 Cir., 296 F. 2d 1. In either case, the role of determining such reasonable fitness should be left to the fact trier, whether it be a judge or a jury. Judge Clark's objection will be discussed in the second "reason for granting the writ" since its principal concern is that the

determination of "reasonable fitness" by the fact finder is, in effect, applying the negligence standard of reasonable care. His view, which prevailed in the case at bar, would nullify the *Mitchell* standard of reasonable fitness for intended use.

Furthermore, the implicit finding by the District Judge that the libelant did not prove the existence of any defect amounting to unseaworthiness and that the underlying cause of his accident is left in doubt, is not only a finding subject to the clearly erroneous test, *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 114 F. 2d 248, but also, as this Court held in affirming, 314 U. S. 104, a party seeking to prove a breach of warranty of seaworthiness has the burden of persuading the court of the existence of a defect amounting to unseaworthiness.

II.

THE REJECTION OF THE COURT OF APPEALS OF THE TRIAL COURT'S FINDINGS OF REASONABLE FITNESS FOR THE SPECIAL USE FOR WHICH THE VESSEL AND HER APPURTENANCES WERE INTENDED, AS PART OF THE STATUTORY BI-ANNUAL INSPECTION BY THE COAST GUARD, AND ITS FAILURE TO DISCRIMINATE BETWEEN THE RELATIVE FITNESS FOR USE BY A SHORE BASED PERSON ENGAGED IN THE SPECIAL TASK OF ASSURING THE EXISTENCE FOR FUTURE USE IN NAVIGATION AND A PERSON ENGAGED IN A TASK INVOLVING THE NAVIGATION OF A VESSEL, MAKES A NULLITY OF THE REASONABLE FITNESS STANDARD PRESCRIBED IN *Mitchell* v. *Trawler Racer, Inc.*

THE EXTENT OF THE AUTHORITY OF THE TRIER OF THE FACTS TO DETERMINE SUCH REASONABLENESS IS THE SUBJECT OF AN INTENSE INTRA-CIRCUIT CONFLICT WHICH CALLS FOR REVIEW BY THIS COURT.

While the Court of Appeals mentioned the reasonableness standard, this was only lip service, for it completely rejected the trial court's findings and required, instead, a standard of perfection.

Nowhere did it pose the requisite question: "How fit was the vessel for the particular task?" Nor did it assess any degree of fitness. Setting aside the trial court's judgment of reasonableness, it concluded that the three so-called "conceded physical facts" required a finding of "unfitness" for the task and that (in effect) the accident alone, emanating from part of the vessel, made the ship "unfit." "Unfitness" and "unfit" are total words precluding the interjection of reasonableness.

Clearly, the very work contemplated the presence of steam in the appurtenance. As the libelant himself testi-

fied, part of the work was "testing if steam comes out, or anything like that, water comes out."

The failure of the Court of Appeals to consider unseaworthiness as a relative concept raises an important question of law with respect to the "intended use" portion of the definition of unseaworthiness set forth in the *Mitchell* v. *Trawler Racer, Inc., supra.*

In the case at bar the Court seemed to construe unseaworthiness as a general concept determined without regard to the special and unusual use involved. Yet in *Pinto* v. *States Marine Corp. of Delaware,* 2 Cir., 296 F. 2d 1, at page 3, it approved a charge that "unseaworthiness is a relative concept." In this case it seems to have avoided the relative concept altogether. In determining whether a district court had properly held that the shipowner had not breached a warranty of seaworthiness to the libelant, the court was required to take into consideration the fact that the purpose of testing the appurtenances of the vessel in accordance with the requirements of law for inspection by the United States Coast Guard, was to assure and make the vessel seaworthy, and totally different from a use by a member of a crew of the appurtenances of a vessel while being operated as a vehicle for transportation.

The use of a vessel for testing appliances to determine fitness for later use by crew members and others similarly situated, leaves considerable latitude with respect to reasonable fitness as distinguished from such later use.

There is a strong intra-circuit conflict in the Second Circuit concerning the thrust of the phrase "reasonable fitness for their intended use" as prescribed in *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539. Judge Clark who wrote the opinion in this case has stated that he advocates the view of "strict liability" and apparently urges that permitting the trier of the facts to determine reasonable-

ness for intended use is in effect applying the negligence doctrine of "reasonable care."

In *Dickinson* v. *Petroleum Corp.*, 338 U. S. 507, this Court held that certiorari could be granted to resolve an intra-circuit conflict. Apparently the use of the *in banc* procedure cannot resolve the Second Circuit conflict, for Judge Clark, as hereinafter indicated, has been unsuccessful in obtaining rehearings *in banc* in cases where claims of unseaworthiness have been disallowed and, in this case, he refused to request a hearing *in banc* when his view prevailed.

In *Pinto* v. *States Marine Corporation of Delaware*, (2 Cir.) 296 F. 2d 1, the majority, at page 6, stated that they read the *Mitchell* case as holding that the trier of the facts (a jury) is to determine whether a vessel was "reasonably suitable for her intended use." On the denial of the petition for a rehearing *in banc* Judge Clark dissented and suggested that his colleagues were really following the minority opinion of this court in the *Mitchell* v. *Trawler Racer, Inc., supra*, and seemed to urge that it was not the duty of the judges of the Court of Appeals to follow the decisions of this Court as they read them but rather to "enforce the shipowner's responsibility by strict liability." Naturally, a test of reasonableness would be contrary to a view that suggests "strict liability."

Judge Clark noted that *in banc* procedure would only be a temporary palliative in resolving conflicts of views and that the permanent corrective could be supplied only by this Court.

In *Ezekiel* v. *Volusia Steamship Co.*, 297 F. 2d 215, the majority affirmed the determination by a judge sitting in admiralty and held that a vessel met its responsibility for seaworthiness by making goggles available to crew members for use in chipping rust and that there was no lia-

bility to a crew member who failed to avail himself of these goggles, although they had been issued to him for his use and he did not put them on. Judge Clark dissented, at page 217, and in effect rejected the concept of reasonableness. In citing, among other cases, his decision in the case at bar (*Van Carpals* v. *SS American Harvester*, 2 Cir., 297 F. 2d, 9), he urged his extreme views on liability for unseaworthiness, stating that a shipowner is liable even if the asserted unseaworthy condition is created by the plaintiff himself, and while again giving lip service to the standards of the *Mitchell* case, he rejected the holding of the majority on the ground that even if goggles were available and furnished to the crew member the shipowner is liable simply because the seaman "is not wearing goggles while engaged in rust chipping" and that "is itself an unseaworthy condition" no matter what steps the shipowner took "unsuccessfully to see that they were worn."

In the, as yet, unreported case of *Pudda* v. *Royal Netherlands Steamship Company*, *supra*, decided January 3, 1962, denial of the petition for rehearing *in banc* decided February 20, 1962, the original panel, after sustaining the findings as not being clearly erroneous, held that the longshoreman, the plaintiff in that case, had failed to prove that any unseaworthy condition caused his injuries, that the shipowner was not liable for negligent conduct of plaintiff's fellow workmen.

In his dissent from the denial of the petition for a rehearing *in banc*, Judge Clark reiterated the view that they should be resolved as far as feasible by a consideration *in banc* and urged that the shipowner should be liable even for conditions created during the work by the negligence of a longshoreman's fellow worker no matter how short-lived, thus rejecting the concept of reasonableness.

Other decisions of the Second Circuit, such as *Hooper* v. *Terminal Steamship Company*, 296 F. 2d, 281, and *Richter* v. *Mathiasen's Tanker Industries*, 297 F. 2d, 494, apply the concept of "reasonable fitness for intended use" by construing this court's "reasonable fitness" admonition in the *Mitchell* case as meaning exactly what it says.

III.

THE HOLDING THAT A WARRANTY OF SEAWORTHINESS EXISTS IN FAVOR OF A SHORE-BASED WORKER ENGAGED IN TESTING THE SHIP FOR THE BI-ANNUAL INSPECTION REQUIRED BY 46 U. S. CODE, SECTIONS 391, 392, 399, AND 46 CODE OF FEDERAL REGULATIONS, PART 91, AND THE FURTHER HOLDING THAT A VESSEL MUST BE OUT OF NAVIGATION TO NEGATE SUCH A WARRANTY, PRESENTS AN IMPORTANT QUESTION WHICH THIS COURT LEFT OPEN IN *West* v. *United States* AS UNNECESSARY TO DECIDE BECAUSE IN THAT CASE THE STATUS OF THE VESSEL WHOLLY OUT OF NAVIGATION PRECLUDED A WARRANTY TO ANYONE WITHOUT REGARD TO HIS PARTICULAR TASK.

This court should review the important question left open in *West* v. *United States*, 361 U. S. 118, as to whether the owner of a ship not wholly out of navigation warrants her seaworthiness to a shoreworker engaged in a task which is not regarded as parcelled out seaman's work, in this case testing the ship for the purpose of obtaining a certificate of inspection that would entitle it to continue in navigation.

In denying the petition for rehearing, the Court of Appeals held that *Filipek* v. *Moore-McCormack*, 2 Cir., 258 F. 2d 734, cert. denied 359 U. S. 927, and other cited cases, did not support petitioners' position, because, there, the ship was out of navigation. However, the *Filipek* case was not decided on that basis, although the *West* case was.

Apparently the Court of Appeals concluded that unless the status of the vessel is such that no warranty exists as to all, nothing in the nature of the work being performed negates the existence of such a warranty. Surely this "all or nothing" attitude is not the law.

In *West* v. *United States, supra*, the libelant was an employee of an independent contractor engaged in testing a vessel for defects while the vessel was undergoing a complete overhaul and wholly out of navigation. As the court said, at page 122, there was no necessity for determining whether there was a warranty to a workman doing a specific type of work because there was no "warranty of seaworthiness to any person."

In *Roper* v. *United States*, 368 U. S. 20, this Court held there was no warranty of seaworthiness to the workman because the status of the ship was such (dead) that there was no warranty of seaworthiness to anyone. As the Court indicated in a footnote at page 24, there is no warranty of seaworthiness simply because "those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness."

One of the considerations in *Roper* was that the vessel had "lost her Coast Guard safety certification" which was a requisite to a vessel in navigation.

In the case at bar, the vessel could not continue in navigation until she obtained a fitness certificate from the Coast Guard certifying as to the inspection of her boilers and other equipment.

In *Filipek* v. *Moore-McCormack*, 2 Cir., *supra*, (referred to with approval in the *West* case), the Court of Appeals held, at page 736, that a shipowner did not warrant the seaworthiness of a vessel to a workman engaged in testing a vessel, not because she was out of navigation, but be-

cause such testing was required by law and had to be done by outside experts and not by crew members. As in this case, a certification had to be obtained from the American Bureau of Shipping in order to obtain clearance from the Coast Guard, and "the American Bureau of Shipping would not have issued a certificate approving the tests if conducted by any member of the defendant's crew."

It is submitted that there was no warranty of seaworthiness to libelant in this case for his status is similar to that of the workman in the *Filipek* case, engaged in a task which is neither routine nor one of ordinary maintenance.

46 U. S. Code, Section 392b, requires that the boilers of a vessel be inspected by the Coast Guard at least once every two years, and sub-division d requires hydrostatic tests, as in this case, be made to all boilers and main steam piping as well as other tests required by the Coast Guard.

46 U. S. Code, Section 399, provides that no vessel shall be navigated without a certificate of inspection.

46 U. S. Code, Section 391b, requires a general Coast Guard inspection of non-passenger vessels at least once every two years, the purpose of which, among others, is to warrant that the ship may be used in navigation with safety to life.

It was pursuant to these statutes that the vessel in question was being inspected and also pursuant to the Regulations of the Coast Guard set forth at Part 91 of 46 Code of Federal Regulations (Inspection and Certification). Section 91.15-1 provides that the standards established by the American Bureau of Shipping shall be used and that the certificates of the American Bureau of Shipping shall be accepted as standard, and Section 91.27-1 provides that at least one re-inspection shall be made on each vessel holding a certificate of inspection valid for two years.

As appears from the record (R. 13a), the inspection in this case was an American Bureau of Shipping inspection which results in certification to the Coast Guard as a basis for the issuance of the certificate to permit the vessel to engage in navigation.

In *United States* v. *Gahagan Dredging Corporation*, 2 Cir., 289 F. 2d 639, at page 641, it is emphasized that the very purpose of this type of inspection is to protect lives and property that might be endangered by the unseaworthiness of the vessels required to be inspected.

How, under these circumstances, can it be validly held that a shipowner warrants the seaworthiness of a vessel to those shoreworkers who are hired for the very purpose of testing the vessel for seaworthiness? It is submitted that it is not necessary that a vessel be out of navigation to negate a warranty of seaworthiness, yet it could be urged that a vessel in the status of the SS *American Harvester*, in the process of being inspected in order to navigate, is *pro tanto* out of navigation as to those persons testing it for seaworthiness, should the out of navigation standard be dogmatically applied as the only standard. But surely that standard has no monopoly, for if there is no "parcelling out" of seaman's work to obtain "the advantages of more modern divisions of labor," as this Court said in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, the purpose of granting that warranty is not fulfilled. How can such a person have or rely on such a warranty when his sole duty is to ascertain the very existence of seaworthiness?

CONCLUSION

The writ of certiorari should be granted, the Court of Appeals judgment reversed, and the decree of dismissal reinstated in accordance with the trial court's finding of seaworthiness.

If this Court does not summarily grant such reversal and reinstatement of the district court's decree of dismissal, then it is respectfully requested that the Court review all of the questions presented.

Dated: March 23, 1962.

Respectfully submitted,

THOMAS COYNE,
Counsel for Petitioner.

CHARLES N. FIDDLER,
ROBERT P. HART,
Of Counsel.

APPENDIX TO PETITION

Original Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—September Term, 1961.

(Submitted November 2, 1961 Decided December 13, 1961.)

Docket No. 27046

EMANUEL VAN CARPALS,
Libelant-Appellant,

v.

SS AMERICAN HARVESTER, UNITED STATES LINES COMPANY,
Claimant-Respondent-Appellee,

v.

TODD SHIPYARDS CORPORATION,
Respondent-Impleaded.

Before:

CLARK, HINCKS and FRIENDLY,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge.*

Emanuel Van Carpals appeals from dismissal of his libel for damages for personal injuries against the SS "*American Harvester*"; and United States Lines Company, the claimant shipowner, takes a "protective" appeal from the dismissal of its claim over against Todd Ship-

yards Corporation, the impleaded respondent. On the first appeal, reversed and remanded; on the second appeal, affirmed.

SIMON N. GAZAN, New York City, for libelant-apellant.

ROBERT P. HART, of KIRLIN, CAMPBELL & KEATING, New York City (PATRICK J. GILMARTIN and CHARLES N. FIDDLER, on the brief), for claimant-respondent-appellee.

PATRICK E. GIBBONS, of TERHUNE, GIBBONS & MULVEHILL, New York City, for respondent-impleaded.

CLARK, Circuit Judge:

Libelant Van Carpals appeals from dismissal of his libel for damages for personal injuries sustained on the SS *"American Harvester"* while he was working as a shore mechanic for Todd Shipyards Corporation, which had been employed by United States Lines Company, the shipowner, to prepare the ship's pipes and valves for inspection by the Coast Guard. The district judge found the facts as follows:

> "The boilers of claimant's steamship were being subjected to a periodic examination by the Coast Guard. The libelant was removing a bonnet from a valve preparatory to its being examined. There were 8 bolts connecting the bonnet to the valve. After he loosened up four of the nuts, some water escaped, and libelant notified his snapper. The snapper said he would have the water shut off. In the meantime, the libelant and the snapper went to lunch. When they returned the snapper told the libelant that the lines were clear, and the libelant unscrewed all 8 nuts and pried the bonnet loose from the valve with the aid of a screwdriver. Nothing came out at the time.
>
> "Libelant went up on top of the boiler to be in a better position to pull the bonnet off. When the

bonnet came off, steam and then hot water gushed forth from the valve, burning the libelant."

There was also testimony from the "snapper" or foreman, as well as from the first engineer, that with the gauges disconnected after the initial pressure had been noted, a check then showed no pressure on the line; and they both appear at a loss to understand how the water later could escape from the valve. So the trial judge said, "This appears to be the type of unexplained accident for which liability cannot be predicated on negligence"; and he held that, since the checks showed an absence of pressure, the vessel was not unseaworthy. Accordingly he dismissed the libel.

We disagree and hold that under prevailing law the vessel must be held unseaworthy.[1] Though the cause of the accident may be inexplicable, yet it, and the way it occurred, demonstrated that the valve was actually not in a safe condition for the work needed to be done upon it. The trial court believed that the independent tests made to double check the gauges and the fact that libelant saw no signs of pressure negated an unseaworthy condition. But we do not think that follows. The accident occurred; there was steam in the valve; and it ~~exploded~~ erupted. These conceded physical facts imperatively required a finding of unfitness for the task in hand. Thus a conclusion of unseaworthiness should have been reached irrespective of the proofs tending to absolve the owner of negligence.

Thus the situation falls within the "absolute" duty of the shipowner to furnish a seaworthy ship which "is essentially a species of liability without fault, analogous to other well known instances in our law." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94, quoted in *Mitchell* v. *Trader Racer, Inc.*, 362 U. S. 539, 549, which has now settled the

[1] In his memorandum of decision the trial judge complains that there was no allegation of unseaworthiness in the libel. But in federal pleading there is no need to plead legal conclusions; these are for the court to apply. And the question became academic when the court reopened the case expressly for the purpose of considering the claim of unseaworthiness.

law we must apply. The *Mitchell* case points out that since *Sieracki* the Court's decisions "have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care"; that it applies equally to a condition arising after the vessel leaves her home port as before, or to one which may be only temporary; that it applies to defective equipment temporarily brought on board by an independent contractor over which the owner had no control; and that the latter's actual or constructive knowledge is not essential to his liability. "What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history." 362 U. S. 539, 549, 550.[2] See also *Mickalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, and our own decision in *Sprague* v. *The Texas Co.*, 2 Cir., 250 F. 2d 123.

It thus appears clear to us that the shipowner cannot wipe out this "absolute" duty by saying that he does not know what caused the particular accident or suggesting in effect that it was an act of God. Libelant claims reliance upon the tort doctrine of *res ipsa loquitur*. That doctrine may be applicable in ship cases, cf. *Johnson* v. *United States*, 333 U. S. 46, 49; but here resort to it as normally conceived is not necessary. For it is customary to state certain requirements for or limitations upon the application of *res ipsa loquitur*—such as that the accident would not ordinarily occur without negligence, that the defendant has exclusive control of the injuring agency, that the acci-

[2] The Court went on to say: "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." 362 U. S. 539, 550. But as the Court is at pains to point out, this has reference merely to the standards set for the ship and its appliances, and not to the duty, which remains absolute. Thus it is an absolute duty to furnish a reasonably fit ship—a duty not performed here.

dent would have happened without any act by plaintiff, and that it only creates something in the nature of a permissible inference, 2 Harper & James, The Law of Torts 1075-1107 (1956)—which have no place (or are automatically supplied) in the absolute duty of the shipowner (quite apart from theories of negligence) to provide a seaworthy ship. Under the circumstances here disclosed of substantial injury from a failure of the ship's machinery, which demonstrates that it was unfit for its intended use, the breach of duty is clear. The dismissal of the libel must therefore be reversed and the action remanded for the fixing of the amount of libelant's damages.

Claimant, United States Lines Company, has taken what it terms a "protective" appeal from the dismissal of its claim for indemnity against Todd, which it cited in as third-party defendant. We see no basis upon which the shipowner here may pass on its liability for the unseaworthy condition of its vessel to the repairer. Compare *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563; *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423, 428-429; and *Calderola* v. *Cunard S.S. Co.*, 2 Cir., 279 F. 2d 475, 477-478, certiorari denied *Cunard S.S. Co.* v. *John T. Clark & Son*, 364 U. S. 884.

Dismissal of libel reversed, and action remanded for award of damages to libelant; dismissal of claim for indemnity against impleaded defendant, Todd Shipyards Corporation, affirmed.

(50)

Opinion of the District Court.

[Same Title]

Metzner, D. J.:

The libel alleges that the libelant was employed by the Todd Shipyards. On July 30th, 1958 he was aboard the claimant's steamship "*American Harvester*", engaged in removing a valve from the port boiler. In the course of exercising his duties, libelant alleges that he was burned

as a result of steam and hot water gushing out of the valve, which resulted in the injuries complained of. The libel alleges that the libelant is relying upon the doctrine of *res ipsa loquitur*. There is no allegation of unseaworthiness.

(51) The boilers of claimant's steamship were being subjected to a periodic examination by the Coast Guard. The libelant was removing a bonnet from a valve preparatory to its being examined. There were 8 bolts connecting the bonnet to the valve. After he loosened up four of the nuts, some water escaped, and libelant notified his snapper. The snapper said he would have the water shut off. In the meantime, the libelant and the snapper went to lunch. When they returned the snapper told the libelant that the lines were clear, and the libelant unscrewed all 8 nuts and pried the bonnet loose from the valve with the aid of a screwdriver. Nothing came out at the time.

Libelant went up on top of the boiler to be in a better position to pull the bonnet off. When the bonnet came off, steam and then hot water gushed forth from the valve, burning the libelant. He spent two weeks in the hospital and then an extra week at home before going back to work. He testified that he suffered pain for about 7 weeks and received treatments up until December of 1958. He claims a permanent disability in that he cannot completely close his right hand and finds it difficult to properly use the tools necessary in his work.

(52) Dr. Friedman, called by libelant, has found permanent scarring on his right hand due to second and third degree burns and a permanent defect of 15% in the flexion of the right hand. The doctor also testified that, while there is present an osteoarthritic condition in the right hand, it is not severe enough to affect its movement. The hospital record showed second and third degree burns of the left fingers, second degree burns of the right hand, a second degree burn of the left lower leg and first and second degree burns of the body.

Mr. Christiansen, employed by the Todd Shipyards as the snapper on the job, was called as a witness by libelant

and testified that when libelant opened the four nuts before lunch vapor and steam appeared, indicating pressure in the line. He personally checked the gauge, which showed that there was no pressure in the line, and then disconnected the gauge to see if it was working properly. With the gauge disconnected, the check showed no pressure in the line. He went to lunch with the libelant. When he returned he asked the port engineer and the first assistant engineer if it was all right to proceed and they told him that everything was in good order. He confirms libelant's story as to what happened thereafter.

(53) John Boyle, the first engineer on the vessel, testified on behalf of the claimant that the inspection of the boiler had been completed by the Coast Guard and the water let out of the boiler; that the gauges read zero, indicating there was no pressure in the lines. In addition, an independent master gauge used by the inspector showed no pressure in the line. Boyle is as much at a loss to understand how the water could escape from the valve as is Christiansen. He, however, disagreed with Christiansen on the question of whether Christiansen had made the complaint before lunch. Christiansen told him after lunch that he saw some water dripping from the valve, but Boyle testified that this was a normal process of evaporation.

While the libelant in his libel stated that he was relying on the doctrine of *res ipsa loquitur*, the proof proceeded on the theory that notice of a possible defective condition had actually been given to the claimant. In any event, claimant has shown that everything was done that a reasonable person could do to determine if there was water in the line. Libelant's own testimony was that the usual signs of pressure were not present when he loosened the bolts in the afternoon, which led him to attempt to remove the bonnet.

(54) This appears to be the type of unexplained accident for which liability cannot be predicated on negligence.

The claim for judgment over against Todd Shipyards was dismissed at the close of the trial, on the ground that claimant failed to adduce proof to show any basis for recovery if a judgment was awarded libelant.

At the close of the trial libelant's proctor argued for recovery based on unseaworthiness. This was the first indication that this theory of recovery was in the case. In fact, in an informal conference before trial the existence of such a theory was negatived by the proctor. In any event, the court reopened the case pursuant to Rule 23 of the Rules of Practice in Admiralty, and directed both sides to submit memoranda. The case of *Sprague* v. *Texas Co.*, 250 F. 2d 123 (2 Cir. 1957), was brought to the attention of the proctors by the court.

After reviewing the memoranda submitted and the testimony adduced on the trial, I find that the libelant was performing such duties as to permit him to invoke the doctrine of unseaworthiness. However, I also find that the *Sprague* case, *supra*, is distinguishable from the case at bar. In *Sprague* a reading of the gauges indicated the absence of pressure, but there was an (55) explosion when all but two of the nuts had been removed from the heater. The court said that,

> "The conclusion is inescapable that the valves of the gauge were not in proper working condition."

Here not only did the gauges show no pressure, but checks, independent of the gauges, made by the Coast Guard inspector and libelant's superior who testified on his behalf, also showed no pressure. [Lastly, libelant, as indicated above, did not observe the usual signs of pressure even after he had pried loose the bonnet.] The doctrine of unseaworthiness has not been expanded to permit recovery just because someone who may claim its benefits has been injured. I find that the claimant furnished a vessel and appurtenances reasonably fit for use by libelant. *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960).

Libel dismissed. The above decision shall constitute the findings of fact and conclusions of law. So ordered.

Dated: New York, N. Y., May 11, 1961.

CHARLES M. METZNER,
U. S. D. J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 51.

SEPTEMBER TERM, 1961

DOCKET NO. 27046

EMANUEL VAN CARPALS,
Libelant-Appellant,

against

SS. *American Harvester*,
UNITED STATES LINES COMPANY,
Claimant-Respondent-Appellee,

against

TODD SHIPYARDS CORPORATION,
Respondent-Impleaded.

Petition of United States Lines Company for Rehearing.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

United States Lines Company, claimant-respondent-appellee, respectfully prays that this Court grant a rehearing of the above entitled appeal and also a rehearing *in banc*.

1.

The December 13, 1961 opinion of this Court, instead of respecting the findings of the District Judge that the proof showed no pressure in the valve of the boiler and that there was no showing that the valve or gauge was either defective or unseaworthy, adopts an outrageous statement from

the libelant's brief that there was an "explosion", as a "conceded" physical fact.

Clearly, the law has not raised statements by an advocate to a "finding" status, and, clearly, the statement in the opinion that the valve "exploded" is not conceded. On the contrary, on page 5 of the brief of the petitioner, it is stated "we do not have steam under high pressure" and "there was no explosion".

Should the petitioner deem it necessary to apply for a writ of certiorari it will be exceedingly difficult, if not impossible, to explain away a concession that was never made.

Since there was no defect shown in the ship's pipes and valves, which had been tested and examined by the vessel's personnel, by appellant's superior, by the United States Coast Guard and by the American Bureau of Shipping and tested against a master gauge for accuracy and calibration, all shortly before the accident, the Court could not find and did not find any defect whatsoever amounting to unseaworthiness which could have caused libelant's injury.

In *Pinto* v. *States Marine Corporation of Delaware*, 2d Cir., F. 2d , decided October 26, 1961, this Court said (page 40, slip opinion), that it read *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, as holding that "the trier of the facts is to determine" whether a vessel is "reasonably suitable for her intended service", citing its previous decision in *Blier* v. *United States Lines Company*, 2d Cir., 286 F. 2d 920, cert. denied 368 U. S. 836.

The trier of the facts in this case made such a specific finding, as follows:

> "I find that the claimant furnished a vessel and appurtenances reasonably fit for use by libelant."

The Supreme Court spoke out in *McAllister* v. *U. S.*, 348 U. S. 19, against the practice of overturning the findings of a district judge. Yet the findings of the district judge in this case were *clearly correct*, and not *clearly erroneous*.

The aforesaid finding of the District Judge, as well as his holding that the cause of libelant's injury could not be traced to any defect whatsoever in the ship's gear were clearly correct. As stated by Judge Learned Hand in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 114 F. 2d 248, 250 (2 Cir.), aff'd. 314 U. S. 104, a finding that the "cause of the accident has been left in doubt" is as much a "finding" as an affirmative finding.

The writer of this Court's opinion complained, when dissenting in *Filipek* v. *Moore-McCormack*, 2 Cir., 258 F. 2d 735, at 738, cert. denied 359 U. S. 927, that the majority had taken "its cue from plaintiff's brief and argument", yet his opinion has not only taken its "cue" from libelant's brief, but it has also taken "an explosion" as a "fact", although the "fact" existed only in a dissertation of libelant's counsel.

Removing the assertion of an "explosion" from the Court's opinion, the sole basis of its holding is that every ship must be an "accident-free" ship, regardless of the absence of a showing of any defect in any of its appurtenances and in spite of the finding by the trier of the facts of their reasonable fitness for their particular use. Surely, this is not the law.

2.

In *Mitchell* v. *Trawler Racer, Inc.*, *supra*, 362 U. S. 539, our highest Court flatly held that it is not even suggested that the owner is "obligated to furnish an accident-free ship" and that the duty is "*only*" to furnish "appurtenances reasonably fit for their intended use". It did not say that the mere happening of an accident created liability. Nor did it hold, as this Court seems to suggest, that "the liability is absolute" despite the failure of the libelant to prove any breach of any duty whatsoever. Striking the horrendous phrase "and it exploded" all that remains is an accident which occurred despite the overwhelming factual proof that the appurtenance in question was reasonably fit for its intended use. "Intended use" here was

not the ordinary use of a ship's boiler in the operation of a vessel, but, on the contrary, a use by outside experts in performing services required by law in testing a vessel for inspection by the United States Coast Guard.

"Intended use" is obviously a relative concept since it must take into consideration both the manner of the use and the function and status of the person using the appurtenance. In *Pinto* v. *States Marine Corporation of Delaware, supra,* this Court approved (page 35, slip opinion) the charge that "unseaworthiness is a relative concept, dependent in each instance upon the circumstances in which the ship's fitness is drawn into question".

The "use" in this case was not a dismantling of a heater or other minor appurtenance of a vessel while being operated as a vehicle for transportation, such as the use by the crew member in *Sprague* v. *The Texas Company,* 2 Cir., 250 F. 2d 123, who was misled and deceived by a *defective* gauge. This was an extraordinary dismantling and inspection by experts (involving and creating extraordinary hazards) of a major part of a vessel (a boiler) shown *not* to be defective in any respects by all tests made by all the experts. To hold that there is liability in such a case is to strike the words "accident-free ship" and the words "reasonably fit for their intended use" from the measure of liability prescribed by the Supreme Court in the *Mitchell* case.

An essentially reasonable ingredient of this extraordinary use was a likelihood that steam and hot water could be presented in a boiler valve and could come out. As libelant testified (Libelant's Appendix, page 7a):

> "We were supposed to take the boiler valves off for a check by the Coast Guard. So we usually start loosening them and then testing if steam comes out or anything like that, water come out."

3.

In *West* v. *United States,* 361 U. S. 118, the decision in *Filipek* v. *Moore-McCormack, supra,* 258 F. 2d 735, cert.

denied 359 U. S. 927, was referred to with approval, and the Supreme Court emphasized that where the work of an independent contractor, by its very nature, creates the danger, liability of a shipowner to its employees does not attach.

The relationship of the libelant in this case to the shipowner, as an expert (a shore mechanic for a shipyard corporation), involved in the work of preparing a vessel for inspection by the Coast Guard, (which required a certificate by the American Bureau of Shipping) places him in the same position as the rigger in the *Filipek* case, "testing" the ship's booms, and the shipyard worker in the *West* case, engaged in the work of reconditioning and "testing" a vessel. In both cases the Court held that there was no warranty of seaworthiness to the independent contractor's employees.

Libelant's task was that of assisting in the process required by law to make a vessel as seaworthy as a Coast Guard inspection can accomplish. Yet the Court's opinion suggests that even more fitness is required for the expert engaged in making a vessel seaworthy than that required for use by the member of the crew, *Sprague* v. *The Texas Company*, *supra*, 250 F. 2d 123. In *Sprague* the Court based its liability, not on the mere happening of the accident, but on a *proved* misleading defect, *viz.*, a defective gauge which registered a non-existing "zero" pressure, while in fact there was "great pressure", so "great" as to cause an "explosion" which propelled the two remaining nuts from the heater.

Michalic v. *Cleveland Tankers, Inc.*, 364 U. S. 325, also cited in justification of this Court's decision, is hardly pertinent. That case merely held that plaintiff had adduced enough testimony by witnesses in support of his claim that a wrench had defective teeth so as to require his claim to go to a jury. Here, not only was there no proof whatever of any defect, but the trier of the facts actually found that the appurtenances were reasonably fit for their intended use by the libelant.

4.

The Supreme Court, in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 95, 96, held that a shipowner is required to warrant the seaworthiness of a vessel to a longshoreman simply because the owner should not be free to nullify its liability by "parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work", in order to obtain the "advantages of more modern divisions of labor". In the case at bar, however, there is no "parcelling out" of the ship's work to the employees of Todd Shipyard Corporation, the independent contractor, to obtain "the advantages of more modern division of labor", but rather the duty and necessity to comply with the compulsory requirements of the law. Only experts familiar with such structural parts of a vessel as boilers and the ship's pipes and valves could properly prepare the vessel for inspection by the Coast Guard, and as in *Filipek* v. *Moore-McCormack, supra*, 258 F. 2d 735, cert. den. 359 U. S. 927, a certificate would not be furnished to the Coast Guard by the American Bureau of Shipping unless such experts made the test.

A basic holding of the *Filipek* and *West* cases is that no warranty of seaworthiness exists in favor of an employee of an expert independent contractor whose sole purpose is to make a vessel seaworthy by various tests and whose very work creates the hazard.

Thus, apart from the relative consequences implied in a "duty only" to furnish a vessel "reasonably fit" for the "intended use", applicable to the libelant (in performing functions imposed on the steamship owner by law and not by a choice of "modern divisions of labor"), it is manifest that this Court overlooked the required conclusion from the *Filipek* and *West* cases that the law does not impose any obligation on the shipowner to warrant to the libelant the seaworthiness of the appurtenances involved in this case.

5.

The vice inherent in the Court's imposition of liability on the petitioner for the first time, on the mere happening

of an accident, without any showing of any defect whatsoever in the appurtenances, is shown by the injustice created with respect to the claim of the petitioner against Todd Shipyard Corporation for indemnity.

Since the only fact proved by libelant is the escape of steam and hot water from an appurtenance found by all experts to be without any defect, embellished by a lawyer-asserted non-existing "explosion", it is evident that this Court is hard put to see any "basis" in the record to "pass on" such a liability. How could the petitioner show on the present record, that the third party caused a non-proved defect or "brought into play" this judicially imposed "unseaworthy condition", when the libelant produced no proof whatsoever of any defect in the appurtenance or the underlying cause of his accident?

It is submitted that this Court is bound by the District Judge's finding that the vessel was reasonably fit for use by the libelant despite the presence of steam and hot water in the appurtenance being tested for fitness by the libelant yet it is conceivable that some employee of the third party may have done something to the pipe connections while the valve was being dismantled, resulting in the entry of steam and hot water. Of course, this concept, on the present proof, would be just as "immaculate" as the concept that the shipowner breached a duty to and is liable to the employee of the shipyard when it perforce allowed such hot water to escape from an appurtenance found to be perfect so far as any mechanical and human tests could find it.

In any event, if the Court continues to hold that the shipowner is liable, despite the District Court's findings, it should also remand this case to allow the petitioner to adduce proof that the "cause" was the result of unworkmanlike services by the shipyard corporation, notwithstanding the failure of the Court to require any "cause" proof whatsoever by the libelant.

Perhaps the judge who rendered the opinion, charging this petitioner with absolute liability, may have been spurred by his dissent on the rehearing *in banc* application

in *Pinto v. States Marine Corp. of Delaware*, F. 2d , decided November 28, 1961 (slip opinion 204, 205). There he suggested that other members of this Court were following the minority opinion in *Mitchell v. Trawler Racer, Inc., supra*, 362 U. S. 539, while he was following the majority opinion which, in his view, required this Court to enforce the "shipowner's responsibility by strict liability". Does such "strict liability" mean "absolute liability" without proof of any breach of any "absolute duty" and does it include an "explosion" existing only in the imagination of an advocate who inserts the same in his brief? It seems evident that such "strict liability" emasculates the "obligation" and "duty" prescribed in the *Mitchell* case which states that it is not even suggested that a shipowner is obligated to furnish an accident-free ship and that the "absolute duty" "is a duty *only*" to furnish appliances "reasonably fit for their intended use". Referring to the prescribed obligation and duty as "merely to the standard set for the ship" does not require a different conclusion and does not justify the imposition of strict liability, *i.e.*, absolute liability.

Ironically, although the very work performed here by the independent contractor was required by law in order "to safeguard human lives at sea" (a phrase used in the aforesaid dissent to justify "strict liability"), this Court's decision holds that the performance of such "safeguarding" work also creates liability to an employee of such an independent contractor for "unseaworthiness" even though his function is to assure "seaworthiness".

7.

It is respectfully submitted that this Court grant a rehearing, that it delete the words "and it exploded" from the opinion, as well as the statement that it is a "conceded" fact, that it vacate its judgment of December 13, 1961, and affirm the decree below dismissing the libel, and, if the decision on the libelant's appeal is adhered to that it remand the case on the appeal of the petitioner as against Todd Shipyard Corporation so as to permit further proof against it for indemnity.

As suggested by the aforementioned *d'Into* dissent, it is requested that the Court resort to the *in banc* device to resolve any differences of views as to what is meant by "strict liability".

Dated: December 26th, 1961.

KIRLIN, CAMPBELL & KEATING,

By THOMAS COYNE,
A Member of the Firm,
Proctors for Claimant-Respondent-Appellee.

ROBERT P. HART,
CHARLES N. FIDDLER,
Counsel.

CERTIFICATE

I hereby certify that the foregoing petition is presented in good faith and not for delay.

ROBERT P. HART,
Counsel for Claimant-Respondent-Appellee.

Opinion of the Court of Appeals Denying Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—September Term, 1961.

(Petition filed December 28, 1961.

Decided January 10, 1962.)

DOCKET NO. 27046

EMANUEL VAN CARPALS,
Libelant-Appellant,

v.

SS AMERICAN HARVESTER, UNITED STATES LINES COMPANY,
Claimant-Respondent-Appellee,

v.

TODD SHIPYARDS CORPORATION,
Respondent-Impleaded.

Before:

CLARK, HINCKS and FRIENDLY,
Circuit Judges.

PETITION FOR REHEARING

THOMAS COYNE, of KIRLIN, CAMPBELL & KEATING, New York City (ROBERT P. HART and CHARLES N. FIDDLER, of counsel), for petitioner.

PER CURIAM:

Respondent-appellee *American Harvester* now claims that Van Carpals, the employee of an independent contractor, was not within the reach of the doctrine of *Seas*

Shipping Co. v. *Sieracki*, 328 U. S. 85 (1946). For this contention it relies chiefly on *United Pilots Assn.* v. *Halecki*, 358 U. S. 613 (1959), *West* v. *United States*, 361 U. S. 118 (1959), and *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 734 (2d Cir. 1958). The reliance is misplaced: in all three cases the work being done and the functional relation between ship and worker were in no way analogous to that between ship and seaman. In contrast with these cases, the ship here was not withdrawn from navigation; the inspection was routine; and the removal of a valve bonnet is an ordinary maintenance operation. Cf. *Sprague* v. *The Texas Co.*, 250 F. 2d 123 (2d Cir. 1959).

In another aspect of its petition, the respondent-appellee seems not to realize that upon the ascertainment of the facts that deduction of unseaworthiness is a conclusion of law, reviewable as such. *Krey* v. *United States*, 123 F. 2d 1008 (2d Cir. 1941).

Agreeable to the petition, our opinion is amended by deleting the word "exploded," first line, page 332 of the slip opinion, and substituting "erupted." In all other respects the petition is denied.

C.E.C.
C.C.H.
H.J.F.
F. S. C. J. J.

Memorandum of the Court of Appeals Denying Rehearing *in banc*.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EMANUEL VAN CARPALS,
Libelant-Appellant,

v.

SS AMERICAN HARVESTER,
UNITED STATES LINES COMPANY,
Claimant-Respondent-Appellee,

v.

TODD SHIPYARDS CORPORATION,
Respondent-Impleaded.

PETITION FOR HEARING *IN BANC*

KIRLIN, CAMPBELL & KEATING, New York, N. Y., for claimant-respondent-appellee.

No active circuit judge having requested that the case be reheard *in banc*, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

18 January 1962

Pertinent Provisions of 46 United States Code

Mode, Manner, and Extent of Inspection; Certificates; Records

§391. Hulls and Equipment — Steam Vessels Carrying Passengers; Annual Inspection

(a) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every year thereafter, the hull of every steam vessel carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

Steam Vessels Not Carrying Passengers; Biennial Inspection

(b) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every two years thereafter, the hull of each steam vessel, not carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to

be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

SAIL VESSELS OVER 700 TONS OR OTHER VESSELS AND BARGES OVER 100 TONS CARRYING PASSENGERS; ANNUAL INSPECTION

* * * * * *

REQUIREMENTS AND ENFORCEMENT; APPEALS

(d) Whenever it is found on board any vessel subject to the provisions of this title, or any Acts amendatory or supplementary thereto, that any equipment, machinery, apparatus, or appliances do not conform to the requirements of law or regulations promulgated thereunder, the owner or master of said vessel shall be required to place the same in proper condition; and if there shall be found on board any such vessel any life preserver or fire hose so defective as to be incapable of repair, the owner or master shall be required to destroy the same in the presence of an official designated by the head of the department in which the Coast Guard is operating. In any of the foregoing cases the requirements may be enforced by revoking the certificate of said vessel, and by refusing to issue a new certificate until the requirements have been fully complied with. In any case where the head of the department in which the Coast Guard is operating has delegated to a Coast Guard official the authority to enforce the said requirements by revocation of certificates of inspection, the action of said Coast Guard official may be reversed, modified, or set aside by the head of the department in which the Coast Guard is operating on proper appeal by the owner or master of said vessel. Appeals shall be made to the head of the department in which the Coast Guard is operating within thirty days after the final action of the aforesaid Coast Guard official.

EXEMPTIONS

(e) Vessels subject to inspection under this title or Acts amendatory or supplementary thereto while laid up and

dismantled and out of commission may, by regulations established by the head of the department in which the Coast Guard is operating, be exempted from any or all inspection under this section and sections 392, 404, and 405 of this title. R. S. §4417; Dec. 21, 1898, c. 29, §4, 30 Stat. 765; Mar. 3, 1905, c. 1454, §1, 33 Stat. 1023; Mar. 4, 1913, c. 141, §1, 37 Stat. 736; 1946 Reorg. Plan No. 3, §§101-104, eff. July 16, 1946, 11 F. R. 7875, 60 Stat. 1097; June 4, 1956, c. 350, §1, 70 Stat. 223.

Historical Note

Derivation. Act Feb. 28, 1871, c. 100, §11, 16 Stat. 443.

References in Text. The words "this title" referred to in the text, in the expression "under this title or Acts amendatory or supplementary thereto", mean title 52 of the Revised Statutes. For distribution of title 52, sections 4399-4500, of the Revised Statutes, of which this section is a part, see note under section 170 of this title.

Codification. The section, as enacted in the Revised Statutes, was as follows: "The local inspectors shall, once in every year, at least, upon application in writing of the master, or owner, carefully inspect the hull of each steam vessel within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, hose, life-preservers, floats, anchors, cables, and other things, are faithfully complied with; and if they deem it expedient, they may direct the vessel to be put in motion, and may adopt any other suitable means to test her sufficiency and that of her equipment."

It was amended, by Act Dec. 21, 1898, by adding thereto the following words: "The local inspectors shall, once in every year, at least, or upon application in writing of the master or owner, carefully inspect the hull of each sail vessel of over seven hundred tons and all other vessels and barges of over one hundred tons burden carrying passengers for hire within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life."

It was further amended, by Act Mar. 3, 1905, which amendment consisted principally, in the omission of clauses of the original section and of the provision added by said previous amendment,

providing for inspection "upon application in writing of the master or owner," and in the addition, at the end of the section as previously amended, of the proviso beginning with the words, "Provided, That vessels while laid up and dismantled," etc., and of the several provisions following said proviso, to the end of the section.

Upon incorporation into the Code, the words "Secretary of Commerce" were substituted for "Secretary of Commerce and Labor." See note under section 362 of this title.

The former provision of this section providing for appeal from the decisions of the local inspectors to the supervising inspector within ten days was rendered obsolete by 1946 Reorg. Plan No. 3, which abolished both offices and transferred the functions of both to the Commandant of the Coast Guard. The Coast Guard has authority, under its general regulatory powers, to provide for appeals and appellate procedure.

1956 AMENDMENT. Act June 4, 1956, provided for biennial rather than annual inspection of hulls of cargo vessels, and amended section generally, dividing it into subsecs. (a) (e), and changing language to reflect the transfer of Coast Guard functions to the head of the department in which the Coast Guard is operating and to make certain other technical changes.

TRANSFER OF FUNCTIONS. All functions of all officers of the Department of the Treasury, and all functions of all agencies and employees of such Department, were transferred, with certain exceptions, to the Secretary of the Treasury, with power vested in him to authorize their performance or the performance of any of his functions, by any of such officers, agencies, and employees, by 1950 Reorg. Plan No. 26, §§1, 2, eff. July 31, 1950, 15 F. R. 4935, 64 Stat. 1280, set out in note under section 241 of Title 5, Executive Departments and Government Officers and Employees. The Coast Guard, referred to in this section, is generally a service in the Treasury Department, but such Plan excepted, from the transfer, the functions of the Coast Guard, and of the Commandant thereof, when the Coast Guard is operating as a part of the Navy under sections 1 and 3 of Title 14, Coast Guard.

References to local inspectors and assistant inspectors were changed to "Coast Guard" or "Coast Guard officials", "within their respective districts", words "in the performance of his duty" were omitted, and "Commandant of the Coast Guard," was substituted for "board of supervising inspectors with the approval of the Secretary of Commerce", on authority of 1946 Reorg. Plan No. 3. See note under section 1 of this title.

ADMINISTRATIVE DELEGATION OF FUNCTIONS BY SECRETARY OF THE TREASURY. Administrative delegation of functions by Secretary of the Treasury, see note under section 1 of this title.

LEGISLATIVE HISTORY: For legislative history and purpose of Act June 4, 1956, see 1956 U. S. Code Cong. and Adm. News, p. 2641.

CROSS REFERENCES

Section as applicable to foreign private steam vessels, see section 362 of this title.

§392. BOILERS, UNFIRED PRESSURE VESSELS, AND APPURTENANCES; MACHINERY AND ELECTRICAL EQUIPMENT—PASSENGER VESSELS; ANNUAL INSPECTION

(a) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect, before the same shall be put into service and once at least in every year thereafter, the boilers, unfired pressure vessels, and appurtenances thereof, also the propelling and auxiliary machinery, electrical apparatus and equipment, of all passenger vessels subject to inspection.

VESSELS OTHER THAN PASSENGER VESSELS; BIENNIAL INSPECTION

(b) The head of the department in which the Coast Guard is operating also shall require the Coast Guard to inspect, before the same shall be put into service and at least once in every two years thereafter, the boilers, unfired pressure vessels, and appurtenances thereof, also the propelling and auxiliary machinery, electrical apparatus and equipment, of all vessels subject to inspection other than passenger vessels.

EXAMINATION FOR CONFORMITY

(c) The head of the department in which the Coast Guard is operating shall require the Coast Guard to determine to its satisfaction by thorough examination that the boilers, unfired pressure vessels, and appurtenances thereof, also the propelling and auxiliary machinery, electrical apparatus and equipment of all vessels which are subject to inspection under subsections (a) and (b) of this section are in conformity with law and the rules and regulations of the head of the department in which the Coast Guard is operating, and may be safely employed in the service proposed. No boiler, unfired pressure vessel, or appurtenances

thereof shall be allowed to be used if constructed in whole or in part of defective material or which because of its form, design, workmanship, age, use, or for any other reason is unsafe.

Hydrostatic Tests

(d) At each original inspection and at each annual or biennial inspection thereafter, whichever is applicable, all boilers, unfired pressure vessels, and main steam piping shall be subjected to hydrostatic tests or such other tests as may be prescribed by the head of the department in which the Coast Guard is operating. The ratio of the hydrostatic test to the maximum working pressure shall be determined by action of the head of the department in which the Coast Guard is operating. R. S. 4418; June 19, 1886, c. 421, §14, 24 Stat. 82; Mar. 3, 1905, c. 1456, §1, 33 Stat. 1027; June 13, 1933, c. 61, 48 Stat. 125; 1946 Reorg. Plan No. 3, §§101-104, eff. July 16, 1946, 11 F. R. 7875, 60 Stat. 1097; June 4, 1956, c. 350, §2, 70 Stat. 224.

Historical Note

Derivation. Act Feb. 28, 1871, c. 100, §11, 16 Stat. 443.

Codification. The section, as enacted in the Revised Statutes, was as follows: "The local inspectors shall also inspect the boilers of all steam-vessels before the same shall be used, and once at least in every year thereafter. They shall subject all boilers to the hydrostatic pressure; and shall satisfy themselves by thorough examination that the boilers are well made, of good and suitable material; that the openings for the passage of water and steam, respectively, and all pipes and tubes exposed to heat, are of proper dimensions and free from obstruction; that the spaces between and around the flues are sufficient; that the flues are circular in form; that the fireline of the furnace is at least two inches below the prescribed minimum waterline of the boilers; that the arrangement for delivering the feed-water is such that the boilers cannot be injured thereby; and that such boilers and machinery, and the appurtenances, may be safely employed in the service proposed in the written application, without peril to life. They shall also satisfy themselves that the safety-valves are of suitable dimensions, sufficient in number and well arranged; and that the weights of the safety-valves are properly adjusted, so as to allow no greater pressure in the boilers than the amount prescribed by the inspection certificate; that there is a sufficient number of gauge-cocks properly

inserted, and to indicate the pressure of steam, suitable steam-registers that will correctly record each excess of steam carried above the prescribed limit and the highest point attained; and that there are reliable low-water gauges; and that the fusible metals are properly inserted so as to fuse by the heat of the furnace, whenever the water in the boilers falls below its prescribed limits; and that adequate and certain provision is made for an ample supply of water to feed the boilers at all times, whether such vessel is in motion or not, so that in high-pressure boilers the water shall not be less than four inches above the top of the flues; and that means for blowing out are provided, so as to thoroughly remove the mud and sediment from all parts of the boilers, when they are under pressure of steam. In subjecting to the hydrostatic tests boilers usually designated and known as high-pressure boilers, the inspectors shall assume one hundred and ten pounds to the square inch, as the maximum pressure allowable as a working-power for a new boiler of forty-two inches in diameter, made in the best manner, of inspected iron plates, one-fourth of an inch thick, and of a quality required by law, and shall rate the working-power of all high-pressure boilers, whether old or new, according to their strength, compared with this standard; and in all cases the test applied shall exceed the working-power allowed, in the ratio of one hundred and sixty-five to one hundred and ten. In subjecting to the hydrostatic tests boilers usually designated and known as low-pressure boilers, the inspectors shall allow as a working-power for each new boiler, a pressure of only three-fourths the number of pounds to the square inch to which it has been subjected by the hydrostatic test, and for which it has been found to be sufficient. Should the inspectors be of the opinion that any boiler, by reason of its construction or material, will not safely allow so high a working pressure as is above described, they may, for reasons to be stated specially in their certificate, fix the working-pressure of such boiler at less than three-fourths of the test-pressure. All boilers used on steam-vessels and constructed of iron or steel plates, inspected under the provisions of section forty-four hundred and thirty, shall be subjected to a hydrostatic test, in the ratio of one hundred and fifty pounds to the square inch to one hundred pounds to the square inch of the working steam-power allowed. No boiler or pipe, nor any of the connections therewith, shall be approved, which is made, in whole or in part, of bad material, or is unsafe in its form, or dangerous from defective workmanship, age, use, or other cause."

It was amended by Act June 19, 1886, by striking out, after the words "that there is a sufficient number of gauge-cocks properly inserted," the words "and, to indicate the pressure of steam, suitable steam-registers that will correctly record each excess of steam carried above the prescribed limit and the highest point attained," and inserting in lieu thereof the words "and suitable steam gauges to indicate the pressure of steam."

It was further amended generally by Act, Mar. 3, 1905.

1956 AMENDMENT. Act June 4, 1956, provided for a biennial rather than annual inspection for cargo vessels, and amended section generally, dividing it into subsecs. (a)-(d), and changing its language to reflect the transfer of Coast Guard functions to the head of the department in which the Coast Guard is operating and to make certain other technical changes.

1933 AMENDMENT. Act June 13, 1933, amended section generally to extend inspection to unfired pressure vessels, appurtenances, propelling and auxiliary machinery, and electrical apparatus and equipment, among other changes.

TRANSFER OF FUNCTIONS. All functions of all officers of the Department of the Treasury, and all functions of all agencies and employees of such Department, were transferred, with certain exceptions, to the Secretary of the Treasury, with power vested in him to authorize their performance or the performance of any of his functions, by any of such officers, agencies, and employees, by 1950 Reorg. Plan No. 26, §§1, 2, eff. July 31, 1950, 15 F. R. 4935, 64 Stat. 1280, set out in note under section 241 of Title 5, Executive Departments and Government Officers and Employees. The Coast Guard, referred to in this section, is generally a service in the Treasury Department, but such Plan excepted, from the transfer, the functions of the Coast Guard, and of the Commandant thereof, when the Coast Guard is operating as a part of the Navy under sections 1 and 3 of Title 14, Coast Guard.

References to local inspectors were changed to "Coast Guard" and "Commandant of the Coast Guard" was substituted for "board of supervising inspectors" on authority of 1946 Reorg. Plan No. 3. See note under section 1 of this title.

ADMINISTRATIVE DELEGATION OF FUNCTIONS BY SECRETARY OF THE TREASURY. Administrative delegation of functions by Secretary of the Treasury, see note under section 1 of this title.

CROSS REFERENCES

Exemption of vessels laid up and dismantled, see section 391(e) of this title.

Inspection of foreign vessels admitted to American registry, see section 366 of this title.

Section as applicable to foreign private steam vessels, see section 362 of this title.

Pertinent Provisions of 46 Code of Federal Regulations

Subpart 91.15—Inspection of Vessels.

§91.15-1 *Standard in inspection of hulls, boilers, and machinery.* (a) In the inspection of hulls, boilers, and machinery of vessels, the standards established by the American Bureau of Shipping, see Subpart 90.35 of this subchapter, respecting material and construction of hulls, boilers, and machinery, and the certificate of classification referring thereto, except where otherwise provided for by the rules and regulations in this subchapter, Subchapter E (Load Lines), Subchapter F (Marine Engineering), or Subchapter J (Electrical Engineering) of this chapter shall be accepted as standard by the inspectors.

Subpart 91.25—Annual Inspection

• • • • • •

§91.25-10 *Scope of inspection.* (a) The inspection for certification shall include an inspection of the structure, boilers, machinery, and equipment. The inspection shall be such as to insure that the vessel, as regards the structure, boilers, and their appurtenances, piping, main and auxiliary machinery, electrical installations, lifesaving appliances, fire detecting and extinguishing equipment, and other equipment, is in ~~satisfactory~~ condition and fit for the service for which it is intended, and that it complies with the applicable regulations for such vessel, and that the radio installation is in compliance with the requirements of the Federal Communications Commission. If equipment is installed that is not required, such as fire detecting systems, etc., such equipment shall be inspected and tested as required by Subpart 71.25 of Subchapter H (Passenger Vessels) of this chapter.

• • • • • •

CODIFICATION: 91.25-10 was revised by CGFR 53-25, 18 F. R. 7854, Dec. 5, 1953. Subsequently, paragraph (a) was amended to read as set forth above by CGFR 57-18, 22 F. R. 3469, May 17, 1957.

• • • • • •

Subpart 91.27—Reinspection [Added]

SOURCE: §§91.27-1 to 91.27-15 contained in CGFR 57-18, 22 F. R. 3469, May 17, 1957.

§91.27-1 *When made.* (a) At least one reinspection shall be made on each vessel holding a certificate of inspection valid for two years. This reinspection will be made, where possible, between the tenth and fourteenth month of the period for which the certificate is valid.

(b) No written application for reinspection will be required.

§91.27-5 *Scope.* (a) The inspector shall examine all accessible parts of the vessel's hull, machinery, and equipment to be assured that it is in a satisfactory condition.

(b) In general, the scope of the reinspection shall be the same as for the inspection for certification, but will be in less detail unless it is determined that a major change has occurred since the last inspection.

§91.27-10 *Deficiencies in maintenance.* (a) If the reinspection reveals deficiencies in the maintenance as called for by the regulations in this subchapter, such necessary repairs or improvements shall be made as may be ordered.

§91.27-15 *Inspectors not limited.* (a) Nothing in this subpart shall be construed as limiting the inspector from making such tests or inspections as he deems necessary to be assured of the seaworthiness of the vessel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 818

UNITED STATES LINES COMPANY and
SS AMERICAN HARVESTER,

Petitioner,

against

EMANUEL VAN CARPALS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported in 297 Fed. (2d) 9.

The opinion of the Court below denying a re-hearing has not yet been reported, but appears in the Appendix to Petition, pages A-18 and A-20.

The opinion of the United States District Court for the Southern District of New York has not been reported but appears in the Appendix to Petition, pages A-5 to A-8.

Questions Presented

Before we consider the questions presented we wish to correct some misleading statements in the Petition for Certiorari.

Mention is made (p. 2) of the use of the words "and it erupted" in the Court of Appeals' decision, to describe the action of the steam and hot water which issued from the valve and scalded Van Carpals.

The witness used this language with reference to the occurrence:

> "The steam blowed out right in my face, my hands and everything."
>
> Testimony of Van Carpals,
> Libelant-Appellant's Appendix, page 9A (1).

If "blowed out" does not authorize the use of "erupted" then our language is not as elastic as it should be.

Webster's New World Dictionary defines "blow" as "to burst or break by an explosion", and the same authority defines "erupt" as "to cause to burst forth; throw forth; eject".

So when Van Carpals said that the steam "blowed out" he was also saying that it erupted. Even the original word "exploded" was justified.

This criticism of the opinion is mere quibbling.

The Petition presents a false and misleading picture of the relationship of Van Carpals to the work in which he was engaged.

The petitioner, in several places in its "Reasons for Granting the Writ", makes statements like,

> "The holding that a warranty of seaworthiness exists in favor of a shore-based worker engaged in testing the ship for the bi-annual inspection. . . ."
>
> Petition, page 22, Point III.

And again:

> "How, under these circumstances, can it be validly held that a shipowner warrants the seaworthiness of a vessel to those shore-workers who are *hired for the very purpose of testing the vessel for seaworthiness?*" (Italics supplied.)

And again:

> "How can such a person have or rely on such warranty when *his sole duty is to ascertain the very existence of seaworthiness?*" (Italics supplied.)
>
> Petition, page 25.

The fact and the truth was that the actual inspection was to be made by the Coast Guard and not by Van Carpals, a shore mechanic employed by Todd Shipyards.

The job which Van Carpals was to perform was simply to remove the outer coverings from the valve assembly and to expose the valve itself for inspection not by him but by the Coast Guard.

The engineer, Boyle, testified:

> "Q. And what were your duties aboard the ship on that day? A. My duties had been slated out to me the night before, to prepare the engine room for the United States Coast Guard inspection, an A.B.S. examination."
>
> Testimony of Boyle,
> Libelant-Appellant's Appendix, page 13A.

> "Q. What job were you ordered to do on that vessel? A. We were ordered to overhaul the boiler valves, open them up for inspection of the U. S. Coast Guard."
>
> Testimony of Christiansen,
> Libelant-Appellant's Appendix, page 9A (2).

In the Petition on page 8 is this quotation from Christiansen,

> "A. We supposed to take the boiler valves off for a check by the Coast Guard."

So that there is no excuse for this petitioner to attempt to mislead this court into believing that Van Carpals was to do the inspecting when it knew that that job was exclusively for the Coast Guard.

Another grossly misleading and baseless statement is as follows:

> "Clearly, the very work contemplated the presence of steam in the appurtenance. As the libelant himself testified, part of the work was 'testing if steam comes out, or anything like that, water comes out.'"
>
> Petition, page 18, bottom.

That quotation was taken completely out of context. The whole sentence would have yielded a totally different picture.

This was the situation:

It was essential for Van Carpals' safety that the pipes and valve be drained and freed of pressure, steam or hot water. To accomplish this the lines presumably had been opened and drained. The gauge showed no pressure. Before Van Carpals started to work he had been assured by the Port Engineer and the ship's First Assistant Engineer that there was neither pressure nor steam in the lines.

It is not true that Van Carpals' work "contemplated the presence of steam in the appurtenance". The very opposite was true for the contemplated work was to be on valves, pipes and tubes which had been previously freed of pressure, steam and hot water.

And the ship's engineer endeavored to accomplish just that—to obtain a pressure-free, steam-free and hot water-free valves, lines and their component parts.

The version stated by the petitioner is inexcusably false and misleading.

When Van Carpals said that part of the work was "testing if steam comes out", he was referring to his personal precaution to detect the possible presence of steam before he proceeded to remove the bonnet. That was his customary method when doing that kind of job.

The full quotation from his testimony is as follows:

> "We were supposed to take the boiler valves off for a check by the Coast Guard. So we usually start loosening them and then testing if steam comes out, or anything like that, water comes out."

Testimony of Van Carpals,
Libelant-Appellant's Appendix, page 7A

Thus, we see that Van Carpals was simply trying for his personal satisfaction to determine whether there was any pressure in the assembly or "if steam comes out." This was his routine test, his habit. He was not making a general test for that was the job of the Coast Guard. He, as an individual, was merely taking an extra precaution to re-assure himself that it was safe to proceed in unseating that particular valve. His work was not of a nature which "contemplated the presence of steam in the appurtenance", as the Petition states. He had no occasion, with the safety assurances of the engineers in his mind, to "*contemplate*" the presence of steam under pressure. He did not expect to encounter the expulsion of the steam. The steam had no business being there and Van Carpals was naturally surprised when it burst forth upon him.

It is, therefore, clearly apparent that the petitioner was stretching the truth when it tried to create the impression that at the time Van Carpals was injured, he was engaged in making a general test for the presence of "contemplated" steam.

I.

The decision of the District Court was clearly erroneous for the evidence established physical facts which constituted unseaworthiness.

What happened?

In the forenoon, despite the statement of the ship's engineer that there was no pressure and no steam in the line, nevertheless, out of an abundance of caution, Van Carpals and his foreman tested for pressure and found that hot water came out! This finding they reported to the engineer, and they then went to lunch.

After lunch they were positively assured that there was neither pressure nor steam in the line and that it was safe to proceed to expose the valve.

While so engaged there was a "burst-out" of steam and hot water, and Van Carpals was badly scalded.

There was the undisputed physical fact of the eruption of steam from lines which had been represented as entirely freed of pressure and steam, as the engineer had advised.

True, no witness could pin-point the particular defect or insufficiency which caused the steam to erupt but the fact of the happening was not disputed. There was pressure and steam where they should not have been. Manifestly, there was a mechanical defect which captured and held a quantity of steam under pressure and which defect prevented the steam and hot water from flowing out when drainage was established. Even the gauge erroneously showed zero.

An assembly in good seaworthy condition would have yielded to the usual drainage procedure and not retain steam under pressure. If the mechanism had been in proper working order, the accident would not have happened. Manifestly, it was not in a seaworthy condition.

The vessel's equipment was not fit (steam free) for the intended use (unseating the valve) for Coast Guard inspection. Nor was the vessel fit to sail the seas with that pocket or defect in the line, which condition may have caused serious trouble while at sea. The condition, whatever it was, constituted unseaworthiness.

The only reasonable inference to be drawn from such undisputed fact is that someting was not in proper working order. This of itself was sufficient to invoke the inference of defective mal-functioning and, consequently, unseaworthiness.

> *Sprague* v. *The Texas Company*, 250 Fed. (2d) 123.

When the trial judge closed his eyes to these physical facts and ignored the manifest inference which any fair-minded person would have drawn therefrom, his finding of no unseaworthiness was not only clearly erroneous but cannot be justified, as is attempted by petitioner, upon the specious claim that there was no proof of negligence. When unseaworthiness enters, negligence goes out.

Since the physical fact of the eruption of steam was neither explained nor disputed, the fact may be considered as "conceded".

When a judge ignores the undisputed physical fact that, despite assurance that the lines and valves were free from pressure and steam, there was both pressure and steam locked within the very assembly which had presumably been drained and pressure-freed, he thereby made a finding so contrary to fact and law as to be clearly erroneous.

> "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."
>
> *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, at page 395.

II.

Since shore workers who do the work usually and traditionally performed by seamen-members of the crew, they enjoy the same protection as to seaworthy places, appliances and machinery as crewmen.

The work of removing some bolts and lifting a valve from its cradle does not require any mechanical skill which could not be done by any of the ship's engineers. So that this shore worker was doing work which usually fell to the engineers or other mechanics in the crew. Van Carpals was merely a shore workman, relying on muscle power to do the job which could, and, absent the "spread the work" concept, would have been done by the ship's engineer.

So that Van Carpals was, to all intents and purposes, in the category of a seaman and, as such, was entitled to a seaworthy place to work and seaworthy machinery upon which to work when his personal safety depended on the machinery being in a seaworthy condition. His job was not to repair defective machinery.

Even if the legal requirement was for a vessel which was "reasonably fit" for the intended work, it is clear that the assembly upon which Van Carpals was to work was absolutely unfit, unsafe and dangerous.

However, we see no occasion to resurrect the issues of "absolutely safe" or "fit for the intended use" which were most carefully considered in *Mitchell* v. *Trawler Racer*, 362 U. S. 539. The facts in this case leave no room for a re-discussion of those liabilities. The condition which existed constituted an unseaworthy conditon.

Petitioner asks grant of the writ in order to settle an alleged conflict not only intra-circuit but between other circuits.

Any intra-circuit conflict on the question of "reaosnable fitness for the intended use" or of "negligence" has no relevancy to this case because Van Carpals rested his right to recover upon unseaworthiness and not upon negligence.

And, similarly, any conflict between the Second and Ninth Circuits on the question whether negligence is subject to the clearly erroneous test, on appeal, is foreign to any issue in this Van Carpals case.

The trial judge entirely disregarded the unseaworthiness present in the proofs, for he said:

> "This appears to be the type of unexplained accident for which liability cannot be predicated upon negligence."
>
> Petition, Appendix, page 7A (54).

The libelant expressly relied upon unseaworthiness for his proctor, at the close of the trial, addressed the court and said:

> "As I view the legal aspect, the rule applicable would be an obligation on the part of this ship to furnish an absolutely seaworthy place for the man to work."

III.

The holding that Van Carpals, a shore worker, was entitled to a seaworthy place of work, was correct.

We emphasize again that Van Carpals was not himself engaged in testing the machinery in order to make the required inspections. That duty devolved by law solely upon the Coast Guard.

The Coast Guard wanted to inspect that valve and its component parts. Van Carpals was to remove the bonnet and unseat the valve so that it could be easily viewed and inspected by the Coast Guard. Van Carpals had no official

standing. He had no authority to pass upon the condition of the valve. The Coast Guard inspectors were there for that purpose. Van Carpals had no more to do with the official inspection than a nurse who exposes the operation site has to do with the eventual surgery.

We see no reason to attempt any reconciliation of the *West* and *Filipek* cases, or in applying them to the Van Carpals case.

The *West* case involved a vessel which had been withdrawn from maritime service. She was undergoing a complete overhauling. It was a dead ship. The workers upon her were not in the category of seamen.

West v. *United States*, 361 U. S. 118.

The *Filipek* case carries its own distinguishing facts—for, flying the Canadian flag, she operated under Canadian law, and under that law the testing had to be done by a non-crewman—by an outside expert not connected with the ship.

Filipek v. *Moore-McCormack*, 258 Fed. (2d) 734; Cert. denied.

Van Carpals was working on a vessel in navigation, but at dock for a mandatory inspection. She went from her berth to the Todd Shipyards under her own power and with her personnel aboard. She was not out of maritime service while temporarily having her machinery inspected. This vessel was not a dead ship, nor was she one which had for any reason been taken out of service, and without her crew aboard. She was a live, navigable vessel and engaged in navigation just as if moored to her pier to load or discharge cargo.

It is untrue, as claimed by petitioner on page 24 of the Petition, that the status of Van Carpals was similar to that of Filipek in that his work was "neither routine nor one of ordinary maintenance".

Periodical inspection by the Coast Guard was routine procedure and Van Carpals was doing work of "ordinary maintenance" in helping the Coast Guard make the inspection. When the statute requires an inspection that inspection becomes routine.

The petitioner asks:

> "How can such a person (Van Carpals) have or rely on such a warranty (of seaworthiness) when his sole duty is to ascertain the existence of seaworthiness?"
>
> Petition, page 25, bottom.

How can responsible counsel be guilty of such a distortion of fact?

Van Carpals had no duty to ascertain the existence of seaworthiness—that was the duty of the Coast Guard. Van Carpals' sole duty was to expose the parts for the Coast Guard. Van Carpals was to do no testing. His work was perfunctory—simply remove the valve so that it could be conveniently inspected by the only duly authorized inspector. Van Carpals was not an official inspector to determine the safety of the ship's machinery.

Salient Facts

In order to emphasize the utter lack of merit in the contentions of petitioner, we invite the court's attention to two bits of vital testimony.

The First Assistant Engineer Boyle testified:

> "Q. Did you look at the gauge that morning after the hydrostatic test had been performed? A. Yes, I glanced at it.
>
> Q. And did it read zero? A. Yes, they both read zero.

Q. I see. And that indicates there is no pressure there, is that right? A. That would indicate apparently there is no pressure there.

Q. Well, the way it turned out, the word 'apparent' would be a proper word? A. Yes."

Testimony of Boyle,
Libelant-Appellant's Appendix, page 16A.

In addition to the legal presumption that the machinery was seaworthy, there was an express representation and assurance of safety by the Port Engineer Snow and the First Assistant Engineer Boyle given to Christiansen, who was Van Carpal's foreman:

"Q. Did you come back after eating? A. Yes, 12:30.

Q. Did you have another conversation with the first assistant? A. I did, and Mr. Snow, both.

Q. Well, what transpired then with reference to the job? A. Well, then we were told to open it up. Everything was all right.

Q. Who said that to you? A. Mr. Snow and the first engineer.

Q. He said everything was all right? A. All right. 'They can find no pressure on the line'.

Q. Then what did you and Van Carpals proceed to do? A. We disconnected that valve."

Testimony of Christiansen,
Libelant-Appellant's Appendix, page 10A.

"Q. After that was the okay given to Mr. Christianson to go ahead and work? A. Yes. I believe Mr. Snow said it's all right to work."

Testimony of Boyle,
Libelant-Appellant's Appendix, page 17A.

So that, irrespective of considerations of reasonable fitness or unseaworthiness, Van Carpals had an express assurance that everything was safe for him to do the work. It was a virtual warranty.

Conclusion

The District Judge, in ignoring the undisputed physical facts, made a decision which was clearly erroneous.

Van Carpals was a shore worker doing the work usually performed by seamen and stood in a seaman's shoes, so far as the law is concerned.

The vessel was in navigation although temporarily undergoing a mandatory inspection.

Furthermore, the deliberate misstatements of the testimony by petitioner were intended to create the erroneous impressions that

1. Van Carpals' work was to inspect the machinery in the capacity of an inspector rather than in his true role of shore worker to prepare the valve for Coast Guard inspection.

2. Van Carpals made a test for steam and hot water because "the very work contemplated the presence of steam in the appurtenance" (Petition, p. 18, bottom), instead of the truth which was that his only test was, just before loosening the bonnet, he out of habit looked for water, which act was but an isolated personal safety precaution notwithstanding the prior assurances of the engineers.

Such distortions of the testimony were obviously designed to mislead this court in respect of the true relationship of Van Carpals to the official Coast Guard inspection, and to put Van Carpals in a false light.

Such tactics should indicate a denial of the writ.

There is no merit in any ground relied upon to justify the grant of the writ.

Respectfully submitted,

SIMONE N. GAZAN,
Proctor for Respondent.

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OCTOBER TERM, 1961.

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SS. *AMERICAN HARVESTER*,

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against

EMANUEL VAN CARPALS,

Respondent.

PETITION FOR REHEARING.

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SS. *American Harvester*,

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Respondent.

PETITION FOR REHEARING.

United States Lines Company and the SS. *American Harvester* respectfully present this petition for a rehearing of its petition for a writ of certiorari (which was denied on April 30, 1962) for the following reasons:

FIRST.

This suit is one for injuries sustained by the libellant, a shipyard worker, while removing a valve from the port boiler of the SS. *American Harvester* pursuant to a contract with his employer, Todd Shipyards Corporation, while the vessel was undergoing the statutory inspection required by law.

Although the trier of the facts found that he was furnished a vessel and appurtenances reasonably fit for his use, the Court of Appeals reversed the dismissal of the libel and directed a recovery by him on the ground that the

vessel was unseaworthy as a matter of law, stating, among other things:

> "• • • Though the cause of the accident may be inexplicable, yet it, and the way it occurred, demonstrated that the valve was actually not in a safe condition for the work needed to be done upon it."

Although it would seem clear from *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550, that a claimant must prove that the appliance was not in a *reasonably* safe condition, the Court of Appeals in reversing the trial judge's holding, as a matter of law, ignored this requirement. Instead, it concluded that the valve was not "in a safe condition". The *Mitchell* case emphasizes reasonableness in the conclusion of the majority opinion three times. The duty is said to be only to furnish appurtenances "reasonably fit for their intended use"; the standard is "reasonable fitness" and the vessel need only be "reasonably suitable for her intended service".

Can it be said that the Court of Appeals applied this standard when it scuttled the trial judge's holding of reasonableness and allowed a recovery by concluding as a matter of law that the appurtenance was "not in a safe condition for the work"?

If this Court does not review the aforesaid holding by the Court of Appeals we are left in the dark as to what the real standard is.

1. Must the appliance be in a safe condition, *period?*

2. Must the appliance be in an absolutely safe condition?

or

3. Is it essential for a recovery that the appliance be shown not to be in a *reasonably* safe condition?

SECOND.

It would seem evident the libellant had the burden of proof to show that the vessel was unseaworthy with respect to the work he was performing, and, as the Court of Appeals for the 9th Circuit in *Partenweederei, MS Belgrano* v. *Weigel*, 299 F. 2d 897, held, a shoreside worker also has the burden of showing that he is entitled to the protection of the unseaworthiness doctrine afforded a real seaman, i.e., a member of the crew.

Yet in opposing the petition for certiorari he nowhere referred to the contract under which he was working. Perhaps the court may have been misled into believing that the contract required no testing, even though the libellant himself admitted in effect that he relied upon no warranty of seaworthiness because he himself tested to see if steam or hot water came out of the valve.

As this Court held in *West* v. *United States*, 361 U. S. 118, at page 123, the owner of a vessel has no duty to protect the employee of an independent contractor from the risks inherent in carrying out the contract, and when the contract provides for testing it is the nature of the contract and not the particular segment of work performed by the employee that controls the nature of the work in which he is engaged. The testing of the port boiler from which the valve was being removed, was required by the contract which included such testing in the following provision of the contract:

> "8. *Port Boiler (Internal Desuperheater Connection (E)* Fabricate one (1) bent and offset internal desuperheater connection as per blueprint. Install and weld flange to each end. Rig test gear and test each connection to 800 lbs. and prove tight. Remove test gear. Install and weld doubler in way

of water level around desuperheater connection. Transport connection to vessel. Disconnect and remove present deteriorated desuperheater connection from boiler. Fit and install new connection in place with high pressure gaskets and nuts. Test and prove tight. 305.00"

It would be virtually impossible for the Coast Guard to make the inspection alone. The respondent in his answering brief admitted that he was "helping the Coast Guard make the inspection". Counsel for the respondent should know that the Coast Guard relies upon a certificate furnished by the American Bureau of Shipping of a survey made after the shipyard has complied with its contract, in carrying out the statutory duty of the petitioners.

THIRD.

As pointed out in the petition, there is a continuing controversy between the writer of the opinion of the Court of Appeals in this case and other judges of the Court of Appeals of the Second Circuit with respect to the extent of a ship's liability for unseaworthiness.

The decision which petitioner requests this Court to review has since been cited as supporting a rule of absolute liability, which in effect holds that an accident aboard a ship makes the vessel unseaworthy even though in the view of the testifying experts the valve was faultless, and that a recovery is required for every accident aboard a ship which results from "some failure in the ship's operation".

Thus, in the case of *Antonio Nuzzo v. Rederi, A/S Wallenco, Stockholm, Sweden*, decided by the Court of Appeals, Second Circuit, May 14th, 1962, and not yet reported (No. 48 September Term, 1961, Docket No. 26992),

the opinion writer in dissenting cited his decision in this case at several places, including the use of the emotion packed non-existing and withdrawn reference to the "explosion" of a valve. At page 1809 of the slip opinion he expresses his views in terms of "absolute liability" in making the following statement:

> " • • • Liability seems as clear, for instance, as in the case of the unexplained exploding of a valve where we recently reversed a finding excusing the ship from liability. *Van Carpals* v. *S. S. American Harvester*, 2 Cir., 297 F. 2d 9, certiorari denied *U. S. Lines Co.* v. *Van Carpals*, April 30, 1962.
>
> But the opinion of the majority overruling the findings below appears to reintroduce negligence concepts into the law of unseaworthiness, and thus to overthrow, by a kind of covert counterrebellion, the rule of *absolute liability* laid down in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and recently reaffirmed in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539." (Italics supplied.)

At page 1810 of the slip opinion he discloses that in the case at bar he rejected the view of reasonableness in the face of the contrary holding by the trier of the facts in the following statement:

> "• • • This seems a new departure; in *Van Carpals*, for instance, we did not hold ourselves bound by the industry view that the erupting valve was faultless."

Reference was made in the petition for a writ of certiorari to the intra-Circuit controversy disclosed in *Puddu* v. *Royal Netherlands Steamship Company*, decided January 3, 1962 (petition for rehearing *in banc*, denied

on February 20, 1962) which has not yet been reported in the Federal Reports but which is now reported in 1962 American Maritime Cases, 419. In his dissent Judge Clark cited his present decision as authority for the upholding of liability for seaworthiness untrammeled, in effect, by considerations of reasonableness, and disclosed in particular the conflict of this decision with the decisions of the 9th Circuit as to whether the "clearly erroneous" standard applies to questions of unseaworthiness as questions of fact. This *Van Carpals* case, he said, holds that unseaworthiness is a question of law, not one of fact, in the following statement (1962 A. M. C. 424):

> "• • • Moreover, the district judge treated the question of unseaworthiness as one of fact, thus going directly against our rulings that unseaworthiness (like negligence) is a question of law. *Van Carpals* vs. *S.S. American Harvester, supra* (2 Cir., Jan. 10, 1962), 1962 A. M. C. 395 (rehearing denied); *Krey* v. *United States,* (2 Cir.), 1942 A. M. C. 19, 123 F. (2d) 1008. *Cf. Romero* vs. *Garcia & Diaz, Inc.* (2 Cir.), 1961 A. M. C. 592, 286 F. (2d) 347, 355, certiorari denied 365 U. S. 869, 1961 A. M. C. 1924."

The most recently reported 9th Circuit case restricting liability for unseaworthiness to fact is *Licberman* v. *Matson Navigation Company,* 300 F. 2d 661.

Since the filing of the petition for certiorari, the Court of Appeals reconsidered the denial, in the *Puddu* case, of the petition for a rehearing *in banc* and, after full re-consideration, by a decision made May 15, 1962, not yet reported, six judges adopted the original majority opinion of January 3, 1962, as the opinion of the *in banc* court, one judge concurred in a separate opinion and two judges dissented in separate opinions. Contrary to Judge Clark's

statement in the *Nuzzo* case, *supra*, Judge Hays (page 1823 of the Puddu slip opinion) states in his concurring opinion that "there is no case which holds that there is absolute liability".

In Judge Clark's dissent from the May 15, 1962 *Puddu* decision he wonders "why *in banc* consideration was ever granted" in view of the summary disposition of the case, and on page 1824 of the slip opinion he recognizes that the Court of Appeals for the Second Circuit has held that the trier of the facts "must determine in each case whether the duration of a hazard is such as to render the ship unseaworthy", although he disagreed with that holding in *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1. Thus, he complains, at page 1824, that:

> "* * * . . . we have held that the trier of the facts must determine in each case whether the duration of a hazard is such as to render the ship unseaworthy. *Pinto* v. *States Marine Corp. of Delaware*, 2 Cir., 296 F. 2d 1, certiorari denied 82 S. Ct. 874. Yet no such consideration was made here."

The last sentence of that phrase is also applicable to this case for "no such consideration was made here", either. In overruling the trial judge and holding the vessel unseaworthy as a matter of law, Judge Clark made no consideration as to the duration of a hazard. Surely the aforesaid controversy as to the meaning of unseaworthiness and the confusing interpretations of this Court's decisions as to the meaning of reasonableness in this suit and in other law suits should prompt this Court to re-consider its determination and grant review of the decision below, particularly in view of the conflict with the Ninth Circuit as to whether unseaworthiness is a question of law or a question of fact.

FOURTH.

Since the service of the petition for a writ of certiorari the Committee on Merchant Marine and Fisheries of the House of Representatives, reported out, H. R. 207, on March 27, 1962, 87th Congress, 2nd Session, Report No. 1515, a bill "Restricting the Liability of Vessel Owners and Others in Suits Based Upon the Warranty of Seaworthiness", which restricts such a warranty to actual members of the crew of a vessel. The Bill provides as follows:

> "That in any action upon a claim arising under admiralty and maritime law against any ship or vessel of any type, or its owner, agent, or charterer for damages for personal injury to or death of any person, other than a member of the crew of the ship or vessel on which injury occurs, as a result of acts or omissions of the owner, agent or charterer or any of his officers, agents, servants, employees, contractors, or any crew member of the ship or vessel, or the condition of the ship or vessel, liability of the ship or vessel or its owner, agent, or charterer shall be determined without respect to and shall not in any such case be based upon any warranty of seaworthiness or breach thereof."

Even counsel representing organizations opposing the bill did not go as far as the Court of Appeals in stating the measure of safety required for the breach of warrant of seaworthiness. At page 159 of the Reported Hearings of February 20-21, 1962, Mr. Abraham E. Freedman, stated that the ship or equipment should be "reasonably safe under the circumstances".

On the other hand, a layman (a union official) testified at page 208, that the doctrine requires the shipowner "to provide an absolutely safe working place", and, again,

at page 210, that a shipowner must "insure that there are no unsafe working conditions" and "that the liability of the shipowner should be absolute".

Surely, this Court should answer these conflicting and confusing views by reviewing the absolute liability holding in this case.

In *West* v. *United States*, 361 U. S. 118, the Court noted that the sole purpose of the work being done in that case (as in this case) was to make the vessel seaworthy. At page 121 it points out that certain workmen depend upon the seaworthiness of a ship's equipment and gear, but (as in this case) stated that "no such situation is present here".

As in this case, it would be an unfair contradiction to say that the owner held the vessel out as seaworthy. The very nature of the work in this case was to determine the seaworthiness of the ship's boilers by a workman who obviously did not rely upon a warranty but tested the valve to see if steam would come out. Whether it was a personal habit or not, surely the very work here created the hazard, steam coming out of boiler being subjected to a statutory inspection for seaworthiness.

This Court created, in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, a form of social legislation for "humanitarian reasons" in a field in which Congress had already legislated when it granted workmen's compensation to shoreside workers. Although the gravamen of that decision was that the shipowner could not be "free" to nullify its liability by *parcelling out* to others work previously done by members of the crew for the advantages of modern divisions of labor, this Court has thus far avoided dealing with the extent of the "parcelling out" required to impose the liability created by *Sieracki*. When, as in this case, the

shipowner has no choice in "parcelling out" the work required for the rigid requirements of the American Bureau of Shipping certificate for the statutory inspection the shipowner is not "free".

In *West* v. *United States, supra*, and *Roper* v. *United States*, 368 U. S. 20, the court escaped the problem of determining whether specific work was subject to the unseaworthiness doctrine by holding that nobody on the vessel could be considered a quasi member-of-the-crew because nobody on a vessel removed from navigation could be considered a member of the crew.

Although this Court, in *United Pilots Assn.* v. *Halecki*, 358 U. S. 613, appeared to have decided the matter on the question of "work previously done by members of the crew", the decision turned in part on the fact that no members of the crew were present on the vessel while its equipment was being cleaned with carbon tetrachloride.

In view of the foregoing proposed legislation it would seem that this Court should exercise its function to interpret its judge made law by considering in this classic case and in other such cases not only the limits for liability for seaworthiness but the particular type of shoreside worker excluded from its application, without the crutch of whether or not the vessel is or is not out of navigation or whether any members of the crew are present.

A review of this case would clarify the question, and when further action is taken on H. R. 207, the legislators can ascertain whether the doctrine of unseaworthiness requires appliances to be reasonably safe, safe (*period*), or absolutely safe, and also the type of work and persons included in its perimeter.

Conclusion.

It is respectfully requested that the Court reconsider its denial of the petition for a writ of certiorari and grant such petition.

Dated: May 21, 1962.

Respectfully Submitted,

Thomas Coyne
and
Charles N. Fiddler
Counsel for Petitioners.

Robert P. Hart,
Of Counsel.

Certificate.

I, Charles N. Fiddler, counsel for the petitioners, do hereby certify that the foregoing petition for the rehearing is presented in good faith, and not for delay, and is restricted to the grounds above specified.

Charles N. Fiddler
Counsel for Petitioners.